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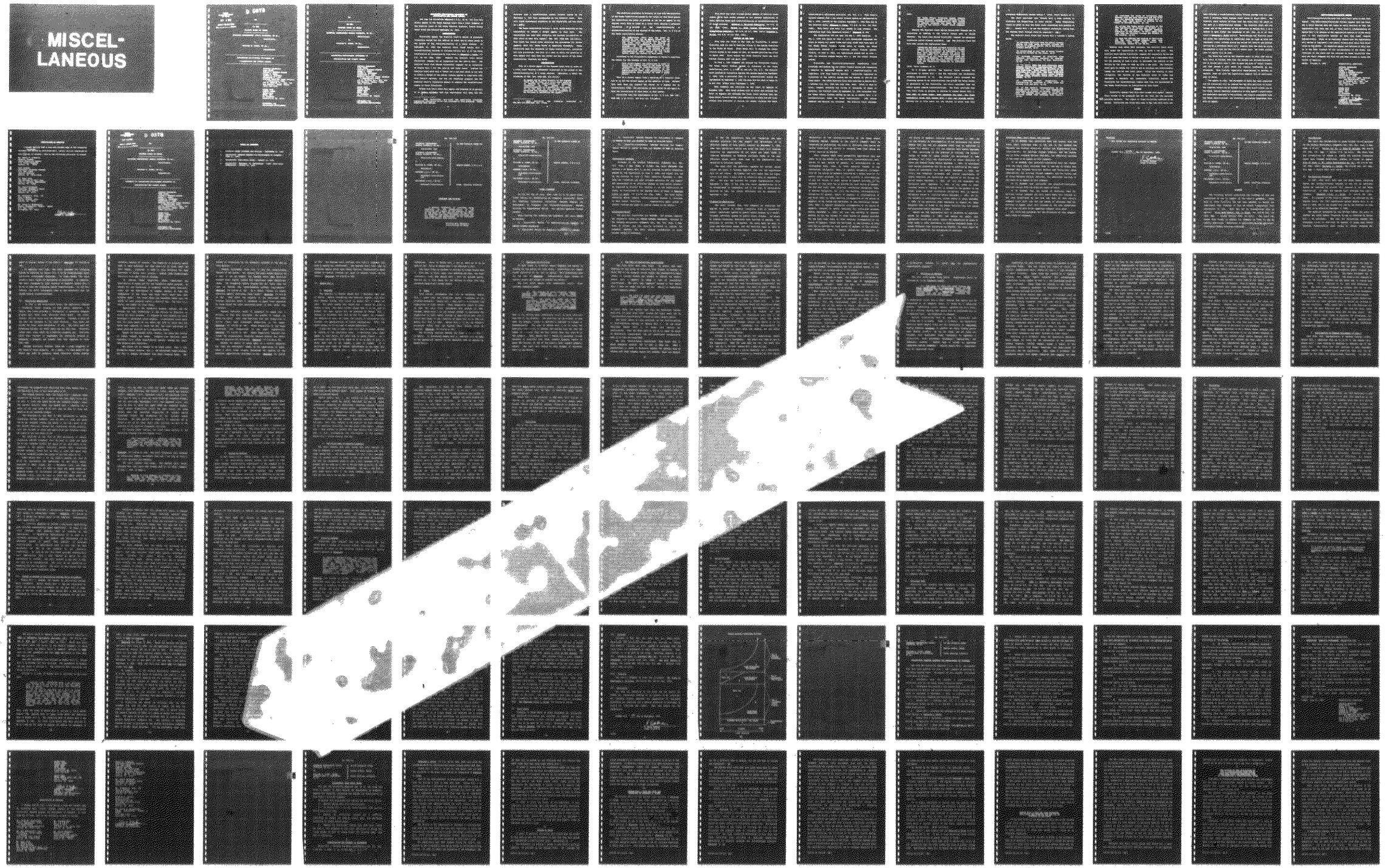

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INTRODUCTION

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According to the interpretive commentary in Vernon's regarding the reason for the passage of Art. V, § 3-b:

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that:

> The Texas School Financing System remains unconstitutional because it continues to deny school districts "substantially equal access to similar revenues per pupil at similar levels of tax effort," (Dist. Court Judgment at p. 2)

However the District Court denied Plaintiffs' request for an injunction of funding in the 1990-91 school year or second semester. The Court also denied Plaintiffs' request for permanent injunctive relief without prejudice. (id) The District Court did hold that unless the legislature does:

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In a 51-page opinion, the District Court reviewed the provisions of Senate Bill 1 and the testimony and documentary evidence presented to it. The District Court presumed the financing system to be constitutional and placed the heavy burden of persuasion on the Plaintiffs, but still concluded that the school system remains unconstitutional. The Court concluded that "the Court finds no purpose in waiting to assess Senate Bill 1. From what is known today, even assuming the best, the Court confidently finds that Senate Bill 1 will not provide equity. Waiting one to five years for the obvious to prove true only

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SUMMARY

Plaintiffs request that this Court accept this appeal, require final briefs to be prepared and set the case for the earliest possible decision. The rights of these Plaintiffs continue to be denied. Plaintiffs who filed this case in May 1984 have still not

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The state was told by the District Court in June 1987 and by this Court in October 1989 that the system was unconstitutional; yet it failed until June 7, 1990 to pass any plan of school finance and then passed a plan which was clearly inadequate by any standards. This history, especially superimposed on decades of neglect, does not give the Legislature support for an additional year of delay.

The appeal is ripe. The statement of facts has been completed and the transcript will be ordered the day this petition is filed. The complete record can be brought before this Court within one or two weeks, making immediate acceptance of this appeal a practicable and reasonable approach to the problem, and clearly consistent with the Texas Constitutional and statutory provisions regarding this sort of appeal.

PETITIONERS/PLAINTIFFS PRAYER

Petitioners/Plaintiffs pray that this Court agree to hear this appeal. The Petitioners/Plaintiffs further request that the Court set a early hearing date and issue an early decision so that the Legislature may have the aid of this Court's interpretation of Senate Bill 1 in advance of the Legislative session or in the early part of the Legislative session so that they might respond appropriately. There is no realistic chance that the Legislature will devise or implement a new school finance plan until this Court rules on the matter. An expedited appeal and decision of this case is in the best interest of the jurisprudence of the state, the interests of the state and the interest of these Plaintiffs that have won their judgment but have not yet been allowed to enjoy the fruits of equality.

DATED: October 8, 1990

Respectfully submitted,

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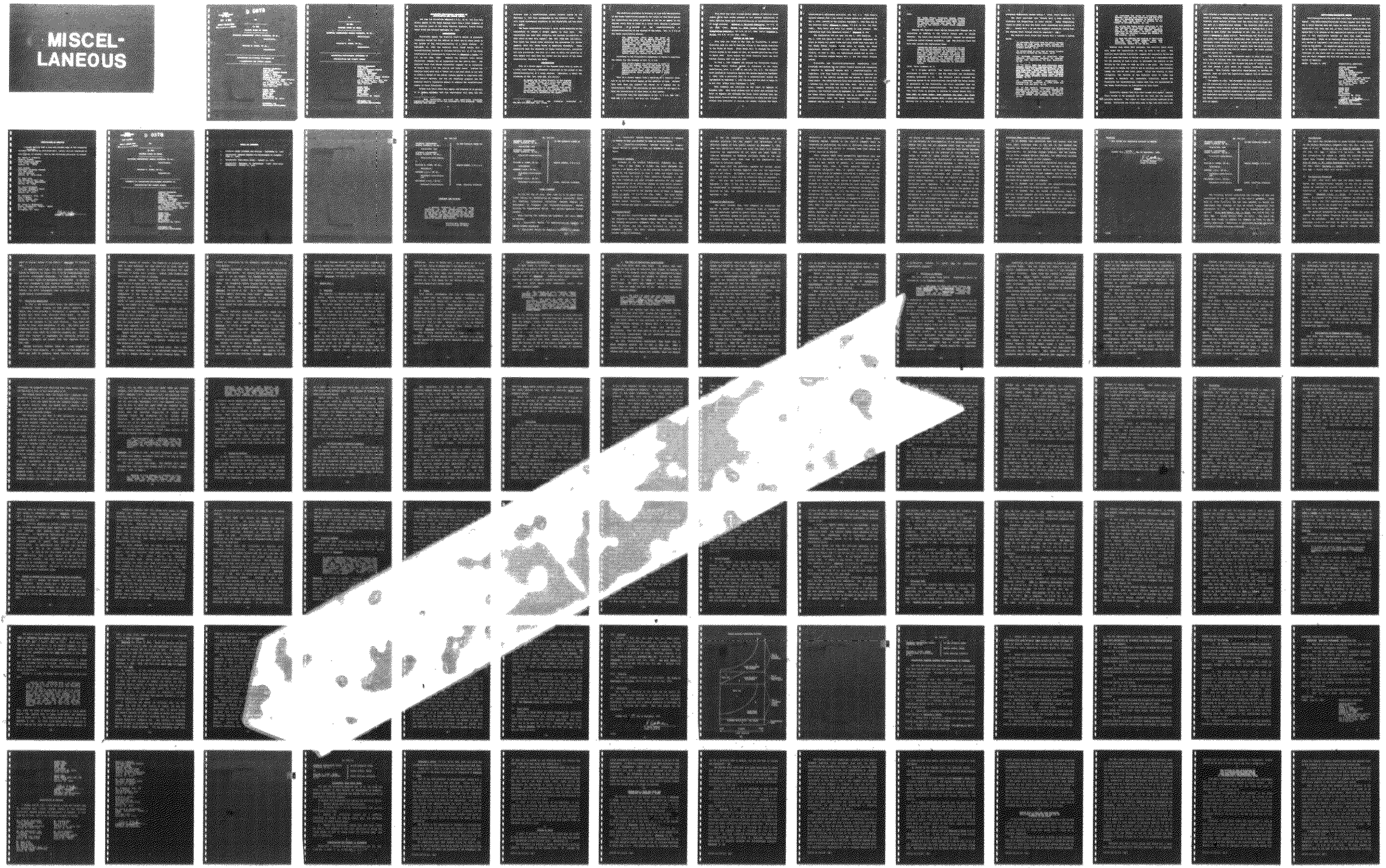

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and appendix was mailed by certified mail, return receipt requested on this 9th day of October, 1990 to the following attorneys of record:

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Austin, TX 78701

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Assistant Attorney General
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Capitol Station
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Mr. Earl Luna
Law Offices of Earl Luna
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Dallas, TX 75205

Mr. David Richards
Richards, Wiseman & Durst
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Mr. Richard E. Gray, III
Gray & Becker
900 W. Avenue, #300
Austin, TX 78701

Mr. Jerry R. Hoodenpyle
Rohne, Hoodenpyle, Lobert & Myers
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ALBERT H. KAUFMAN

D 0378

NO. _____

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents.

APPENDIX TO PLAINTIFFS-PETITIONERS STATEMENT OF JURISDICTION AND DIRECT APPEAL

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TABLE OF CONTENTS

NO. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	IN THE DISTRICT COURT OF
Plaintiffs, and	§	
ALVARADO INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Plaintiff-Intervenors,	§	
V.	§	
WILLIAM N. KIRBY, ET AL.,	§	TRAVIS COUNTY, T E X A S
Defendants,	§	
ANDREWS I.S.D., ET AL.,	§	
Defendant-Intervenors, and	§	
ARLINGTON I.S.D., ET AL.,	§	
Defendant-Intervenors.	§	250TH JUDICIAL DISTRICT

JUDGMENT AND OPINION

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.
>
> Article VII, Section 1
> Constitution of Texas

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Defendant-Intervenors.	§	250TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 9th day of July, 1990, came on to be heard Plaintiffs' Motion for Modification of Judgment; Plaintiffs' Motion for Temporary Injunction; Plaintiffs' Amended Request for Enforcement of Judgment; and Plaintiff-Intervenors' Amended Petition for Supplemental Relief. All parties appeared through counsel.

After hearing the evidence and arguments, the court ORDERS as follows:

1) Plaintiffs' Motion for Modification of Judgment is DENIED WITHOUT PREJUDICE;

2) Plaintiffs' Motion for Temporary Injunction is DENIED;

3) Plaintiffs' Amended Request for Enforcement of Judgment is DENIED IN PART and GRANTED IN PART as detailed below;

4) Plaintiff-Intervenors' Amended Petition for Supplemental Relief is DENIED IN PART and GRANTED IN PART as detailed below.

Declaratory Judgment

Pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code, § 37.004, the court DECLARES that Article I of Senate Bill 1, an act relating to public education, passed by the Legislature on June 5, 1990, and signed into law by the Governor on June 7, 1990, effective September 1, 1990, does not "establish and make suitable provision for the support and maintenance of an efficient system of free public schools," as required by Article VII, Section 1, of the Constitution of Texas, as interpreted by the Supreme Court of Texas in Edgewood I.S.D. v. Kirby, 777 S.W.2d 391 (Tex. 1989). The Texas School Financing System remains unconstitutional because it continues to deny school "districts . . . substantially equal access to similar revenues per pupil at similar levels of tax effort."

Injunctive Relief

All previous injunctions are VACATED. All present requests for injunctive relief are DENIED WITHOUT PREJUDICE. Pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code, § 37.011, and the court's authority to enforce its judgment, however, the court retains jurisdiction to grant further relief if necessary.

If the 72d Legislature does not "establish and make suitable provision for the support and maintenance of an efficient system of free public schools" by September 1, 1991, then upon appropriate motion and proof the court will consider enjoining the expenditure of all state and local funds or ordering defendants to disburse available funds in the most efficient manner until such time as the Legislature does establish an efficient system.

The court will not entertain requests for further relief unless and until it becomes apparent that the 72d Legislature will not act timely. By timely, the court means that the Legislature must enact a plan with an effective date of September 1, 1991. The plan may provide for staged implementation after September 1, 1991, if the time over which implementation is to be accomplished is reasonable, and if the plan is sufficiently detailed so that its likely efficiency can be assessed on September 1, 1991.

Prospective Application

The court intends that this judgment be construed and applied to permit an orderly transition from an unconstitutional, inefficient system of public school finance to a constitutional, efficient system of public school finance. To ensure an orderly transition, districts must continue to operate. For districts to continue to operate, the state must be able to raise and distribute funds, and the districts must be able to levy taxes and enter into contracts. Regardless of the court's

declaration of the unconstitutionality of the Texas School Financing System, nothing in the court's judgment shall be construed as prohibiting the state or districts from taking any action authorized by statute or excusing them from taking any action required by statute.

This judgment shall have prospective application only and shall in no way affect (i) the validity, incontestability, obligation to pay, source of payment, or enforceability of any outstanding bond, note, or other security issued, or any contractual obligation, debt, or special obligation (irrespective of its source of payment) incurred by a school district for public school purposes, nor (ii) the validity or enforceability of any tax levied, or other source of payment provided, or any covenant to levy such tax or provide for such source of payment, for any such bond, note, security, contractual obligation, debt, or special obligation, nor (iii) the validity, incontestability, obligation of payment, source of payment, or enforceability of any bond, note, or other security (irrespective of its source of payment) to be issued and delivered, or any contractual obligation, debt, or special obligation (irrespective of its source of payment) incurred by school districts for authorized purposes before September 1, 1991, nor (iv) the validity or enforceability of any tax levied, or other source of payment provided for any such bond, note, or other security (irrespective of its source of payment) issued and delivered, or any covenant to levy such tax or provide for such source of payment, or any contractual obligation, debt, or special obligation (irrespective of

its source of payment) incurred before September 1, 1991, nor (v) the validity or enforceability of any maintenance tax levied before (for any and all purposes other than as specified in clause (iv) above), nor (vi) any election held before September 1, 1991, pertaining to the election of trustees, the authorization of bonds or taxes (either for maintenance or debt purposes), nor (vii) the distribution to school districts of state and federal funds before September 1, 1991, in accordance with current procedures and law as may be modified by the Legislature in accordance with law before September 1, 1991, nor (viii) the budgetary processes and related requirements of school districts now authorized and required by law during the period before September 1, 1991, nor (ix) the assessment and collection after September 1, 1991, of any taxes or other revenues levied or imposed for or pledged to the payment of any bonds, notes, or other contractual obligation, debt, or special obligation issued or incurred before September 1, 1991, nor (x) the validity or enforceability, either before or after September 1, 1991, of any guarantee under Subchapter E, Chapter 20, Texas Education Code, of bonds of any school district that are issued and guaranteed before September 1, 1991.

Should the 72d Legislature fail to establish an efficient system by September 1, 1991, and should the court, upon appropriate motion and proof, enjoin the expenditure of state or local funds or order defendants to disburse available funds in a manner different than authorized by statute, the court shall do so with due regard for the obligations of contracts.

Attorneys Fees, Court Costs, and Interest

IT IS ORDERED that plaintiffs have and recover from the state their attorneys fees in the sum of One Hundred One Thousand One Hundred Ninety-Six Dollars and Eighty-Seven Cents ($101,196.87), for services through judgment, and the further sum of Fifty Thousand Dollars ($50,000), for additional services in the event of an appeal of this judgment.

IT IS ORDERED that plaintiff-intervenors have and recover from the state their attorneys fees in the sum of Ninety Four Thousand Four Hundred Forty-Six Dollars and Thirty-Four Cents ($94,446.34), for services through judgment, and the further sum of Fifty Thousand Dollars ($50,000), for additional services in the event of an appeal of this judgment.

IT IS ORDERED that plaintiffs and plaintiff-intervenors have and recover from the state all costs of court.

IT IS ORDERED that the awards of attorneys fees for services through judgment and court costs shall earn interest at the rate established by law from the date of this court's judgment until paid, and that the awards of attorneys fees for services on appeal shall earn interest at the rate established by law from the date of the appellate judgment until paid.

All writs and processes for the collection of this judgment shall issue as necessary.

Finality

All relief not expressly granted is DENIED.

SIGNED this 24th day of September, 1990.

F. Scott McCown

F. Scott McCown
Judge Presiding

1445B

NO. 362,516

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OPINION

The following opinion constitutes the findings of fact and conclusions of law in support of the court's judgment. Texas Rule of Civil Procedure 296 has been amended to delete the requirement that findings of fact be stated "separately" from conclusions of law. Both may now be incorporated into an opinion. Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 124 (Tex. App. -- Corpus Christi 1986, no writ). The court has chosen this format to explain its judgment so that it may be readily understood. References to plaintiffs include plaintiff-intervenors unless otherwise indicated.

I. Jurisdiction

The court has jurisdiction to grant further relief pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code, § 37.011. Valley Oil Co. v. City of Garland, 499 S.W.2d 333 (Tex. Civ. App. -- Dallas 1973, no writ). The court also has jurisdiction to vacate or modify its previous injunction based upon changed conditions, subject to review on appeal. City of Tyler v. St. Louis Southwestern Ry. Co., 405 S.W.2d 330, 332 (Tex. 1966); Carleton v. Dierks, 203 S.W.2d 552, 557 (Tex. Civ. App. -- Austin 1947, writ ref'd n.r.e.).

II. The Question Presented

In 1987, this court held that the Texas School Financing System was unconstitutional because it was not an efficient system as required by article VII, section 1, of the Texas Constitution. In 1989, the Supreme Court affirmed this court's judgment. Edgewood I.S.D. v. Kirby, 777 S.W.2d 391 (Tex. 1989). In response to the court's judgment, as affirmed by the Supreme Court, the 71st Legislature passed Senate Bill 1, on June 5, 1990, and it was signed into law by the Governor on June 7, 1990, to be effective September 1, 1990.

The question presented by the motions before the court is whether the Texas School Financing System as modified by Senate Bill 1 is efficient. The test for determining whether the financing system is efficient is whether it gives each school district "substantially equal access to similar revenues per

pupil at similar levels of tax effort." Edgewood, 777 S.W.2d at 397.

In applying this test, the court presumed the financing system as modified by Senate Bill 1 to be constitutional until plaintiffs established otherwise. In other words, the court placed a heavy burden of persuasion on plaintiffs. In addition, the court attempted at each juncture to construe Senate Bill 1 so as to make the financing system constitutional. In the end, however, the court reluctantly came to the conclusion that the system remains unconstitutional.

III. Historical Background

In 1949 in the Gilmer-Aikin Bills, the Legislature adopted a foundation school program to fund public education. In theory, the state provided a "foundation" or minimally adequate program upon which local districts could build. The state, however, did not fully fund the foundation. Instead, a share of the cost was assigned to the local district. This share was called the local fund assignment, or LFA. The state paid the difference between the local share and the full cost. Districts raised their local share by a district property tax. Districts could also "enrich" or supplement the foundation program by assessing a property tax greater than that required to raise their LFA.

Between districts, however, there was a great disparity in the value of local property. As a result, for each penny of tax effort per $100 of property value, districts raised greatly

different amounts of revenue. The disparity in property wealth made it more difficult for some districts to raise their LFA than others. Likewise, it made it more difficult for some districts to enrich their program. Indeed, some property-poor districts could add little or nothing.

To address these inequities, Texas "equalized" the distribution of state aid for the foundation school program. To adjust for the variations in property wealth among districts, state aid was distributed in unequal amounts so that the combination of the state and local share would make each district equal. The local share was therefore based upon the amount of local property wealth a district had. The more local wealth, the higher its local share.

Equalization in the foundation program, however, did not address the vast differences in the ability of districts to enrich the basic program. In response to this problem the state developed a guaranteed yield program. A guaranteed yield means that for every penny of tax effort per $100 of value over and above that required to raise the LFA, the state guarantees an equal yield per district up to a specified amount.

Beyond the guaranteed yield, however, the state did nothing to offset unequal tax bases. Property-rich districts could therefore still raise significantly greater revenue per pupil than property-poor districts.

The system can be thought of as three tiers: Tier 1, the Foundation School Program; Tier 2, the Guaranteed Yield Program; and Tier 3, Unequal Enrichment from Local Property Taxes. The

system is illustrated by the schematic attached to the end of this opinion.

Unequal enrichment from tier 3 was the objectionable feature of the system. Not because the court sought equality as a goal in and of itself, but because while some districts enjoyed great wealth, others had significant unmet educational needs. The Foundation School Program did not "cover even the cost of meeting the state-mandated minimum requirements." Edgewood, 777 S.W.2d at 392. As a result, "almost all school districts spen[t] additional local funds." Edgewood, 777 S.W.2d at 392. Even after the creation of the Guaranteed Yield Program, districts found it necessary to spend funds generated by taxes beyond the state guaranteed yield, in other words, tier 3 dollars.

Because districts found it necessary to spend tier 3 dollars, if they were available, the problem of unequal tax bases was acute. With 1056 districts with vast disparities in wealth, there were tremendous disparities in tax bases. Edgewood, 777 S.W.2d at 392. These disparities in tax bases translated into disparities in per pupil expenditures. Edgewood, 777 S.W.2d at 392. These disparities resulted even though the property-poor districts exerted greater tax effort than the property-rich districts. Edgewood, 777 S.W.2d at 393.

Because the amount of money spent on a child's education has "real and meaningful" impact on his opportunity to learn, where a child lived largely determined the quality of the education opportunities available to him. Edgewood, 777 S.W.2d

at 393. The Supreme Court affirmed this court's judgment that such a system was inefficient. The Supreme Court held that an efficient system gives each school district "substantially equal access to similar revenues per pupil at similar levels of tax effort." Edgewood, 777 S.W.2d at 397.

IV. Senate Bill 1

A. Overview

The question is whether Senate Bill 1 satisfies this test of equity. Before considering this question, however, the court must address whether this attack on Senate Bill 1 comes too soon. The state argues that Senate Bill 1 should be given a chance to work. The state further argues that it is too soon to predict how much equity will be achieved by Senate Bill 1 because of variables that have as yet to happen, for example, the adoption of local tax rates, the results of accountable cost studies, the appropriations of future legislatures. Thus, the state argues, it is not time to assess Senate Bill 1.

A plea for time to show a plan will work is always decided by looking at the particular plan. A particular plan might appear to have merit, but need time to prove itself. Or a particular plan might be so vague as to be no plan at all, in which case time is not needed, a plan is needed. Or a particular plan might be readily identifiable as one that will probably fail. Senate Bill 1 falls into these latter two

categories. Parts of Senate Bill 1 are so vague as to be no plan at all. Parts of Senate Bill 1 are destined to fail.

The court finds no purpose in waiting to assess Senate Bill 1. From what is known today, even assuming the best, the court confidently finds that Senate Bill 1 will not provide equity. Waiting one to five years for the obvious to prove true only postpones desperately needed reform.

B. Flaws

With various refinements that will be discussed, Senate Bill 1 looks like the three-tier system illustrated in the attached schematic. Senate Bill 1 does nothing to eliminate the disparities in local wealth. These disparities remain as great as when the court first considered this problem in 1987. Instead, Senate Bill 1 is yet another attempt to ameliorate the disparities in local wealth through an equalization plan with a little more money in the tradition of House Bill 72 in 1984 and Senate Bill 1019 in 1989. Senate Bill 1 is not the dramatic structural reform that the Supreme Court foresaw would be required. Edgewood, 777 S.W.2d at 397.

The following sections address the flaws in Senate Bill 1 in detail. In discussing Senate Bill 1, reference will be made to the appropriate section of the Education Code as amended by Senate Bill 1.

1. Exclusion of Districts

In bold terms, § 16.001(a) adopts adequacy and equity in funding as the policy of this state. Subdivision (b) adopts fiscal neutrality as the test of equity. This subdivision sets out the test of Edgewood: "substantially equal access to similar revenue per student at similar tax effort."

The fine print begins with subdivision (c)(1), which provides (emphasis added):

> (c) The program of state financial support designed and implemented to achieve these policies shall include adherence to the following principles:
>
> (1) the yield of state and local educational program revenue per pupil per cent of effective tax effort shall not be statistically significantly related to local taxable wealth per student for at least those districts in which 95 percent of students attend school;

What is not obvious about subdivision (c)(1) is which districts have 95% of the students. The districts can be arrayed in many ways, for example, largest to smallest or smallest to largest or alphabetically. The plan of Senate Bill 1 is to array the districts from richest to poorest and exclude from the test the number of districts from the very richest down that have 5% of the students. Thus, Senate Bill 1 begins by excluding 174,182 children in districts with total taxable property wealth of about $90 billion, or 15% of the state's total taxable property wealth. The court will return to this concept of exclusion later in the opinion.

2. The Test of Statistical Significance

The fine print gets even finer. To ensure that each district in the array of districts from richest to poorest in which 95% of the students attend school has substantially equal access to similar revenue per student at similar tax effort, Senate Bill 1 appears to adopt a test of statistical significance. The court says "appears" because in fact Senate Bill 1 does not adopt any test at all. Return to subdivision (c)(1) (emphasis added):

> . . . the yield of state and local educational program revenue per pupil per cent of effective tax effort shall not be statistically significantly related to local taxable wealth per student for at least those districts in which 95 percent of the students attend school. . . .

In plain terms, the section says that the difference between districts in state plus local revenue per pupil shall not be "statistically significantly" related to local taxable wealth.

The state refers to this provision as the self-correcting or self-adjusting feature of Senate Bill 1. As the state describes Senate Bill 1, it works like central air conditioning. When the house gets so hot as to reach the point of statistical significance, the air conditioner automatically goes on to cool the house down.

The term "statistically significant" does sound like it means something precise, but in fact it does not. When a statistician is asked to determine whether two factors such as revenue and local taxable wealth are related, there are several

different statistical tests he can employ to do so. Dr. Forbis Jordan was called by the state to explain the Federal Wealth Neutrality Test. Dr. Robert Berne, an expert statistician in the area of public school finance, was called by the state to explain more sophisticated statistical tests.

What was disturbing about Dr. Berne's testimony was his candid admission that the term "statistically significant" has no meaning. How large is large? How small is small? These are questions that the science of statistics does not answer. They are also questions that Senate Bill 1 does not answer.

So what is meant by "statistically significant"? What § 16.001(c)(1) means, as outlined in Senate Bill 1, is that initially the Legislative Education Board and Legislative Budget Board (what the state calls "senior policymakers"), with the help of impartial experts, will do studies and make recommendations. Ultimately the Legislature will look at the numbers generated by various statistical tests and decide whether any relationship between revenue and wealth is in its judgment "significant." Presumably its determination of "significance" will be made after the members see the dollar cost attached to their decision.

Instead of working like central air conditioning, Senate Bill 1 works like a thermometer. The state will keep an eye on the temperature. When the room gets too hot, the state will act. How hot is too hot? Senate Bill 1 does not say.

"Significance" then is a policy question, not a statistical question. Determining from biennium to biennium how much equity

will be provided is what was done before Senate Bill 1. Such budget-to-budget decisionmaking has not produced equity in the past and will not produce equity in the future.

Before leaving the question of statistical significance, one other point should be made. The standard in § 16.001(c)(1) is that revenue and wealth "shall not be statistically significantly related." Under this test, the Legislature has given itself plenty of room to do nothing.

When looking for a relationship between two factors, for example, revenue and wealth, the level of certainty that the two factors are causally related is expressed in terms of the probability that the relationship shown by a particular statistical test is the result of chance. Probability ranges from .01 to .99, meaning from a 1% possibility of chance to 99% possibility of chance. As a matter of convent[illegible] scientists generally accept results of .05 [illegible] significant," meaning that results of [illegible] statistically significant if ther[illegible] possibility that the relation[illegible] Anything greater than [illegible] significant.

By [illegible]

Leg[illegible]

§ 16.001(c)(1) because it would "not be statistically significantly related."

3. Exclusion of Revenue

The fine print grows finer still. Subdivision (c)(1) is followed by (c)(2) (emphasis added):

> (2) the level of state and local revenue for which equalization is established shall include funds necessary for the efficient operation and administration of appropriate educational programs and the provision of financing for adequate facilities and equipment.

If subdivision (c)(2) were a floor, meaning that equity will be guaranteed at an adequate level, it would be a reassuring promise. Subdivision (c)(2), however, operates not as a floor, but as a ceiling, meaning that equity will be guaranteed only to an adequate level. The difference is immense.

Section 16.001(c)(2) must be read in conjunction with § 16.008 and § 16.256(d). Under § 16.008(a), the Legislative Education Board adopts rules for the calculation of "qualified funding elements necessary to achieve the state funding policy under Section 16.001." By its own terms, not all funds are included, only "qualified" funds "necessary" to implement § 16.001(c)(2), which guarantees "necessary," "appropriate," and "adequate" funding. Notice that § 16.008 is captioned "EQUALIZED FUNDING ELEMENTS." Plainly Senate Bill 1 "equalizes" only for "qualified" funds.

Subdivision (b) sets forth what shall be included in these qualified funds. The key limits are found in (b)(1) and (b)(4). Subdivision (b)(1) refers to tier 1 -- the foundation or basic allotment. These funds are limited to a "regular" program that meets "basic criteria" for accreditation. Subdivision (b)(2) refers to tier 2 -- the guaranteed yield for equal enrichment. These funds are limited to the costs per student of "exemplary programs" as determined by accountable costs studies outlined in § 16.201.

Section 16.201 plainly says that the "accountable costs of education studies are designed to support the development of the equalized funding elements" under § 16.001 and § 16.008. In developing these costs, § 16.201 automatically excludes cocurricular and extracurricular programs. Then, under § 16.202(a), various state bureaucrats do studies to determine the costs per student for districts they deem "exemplary." Then the Legislative Education Board and the Legislative Budget Board develop recommended amounts of money for each year of the next biennium. Even here the Legislature takes no chances. Under § 16.202(b), these boards are told that they "shall" consider those costs "necessary" and shall "exclude all other costs."

Returning to § 16.008(c), after the Legislative Education Board adopts its rules for the calculation of the qualified funding elements, nothing happens except a report to the Foundation School Fund Budget Committee, the Commissioner of Education, and the Legislature. Then, under § 16.256(d), the Foundation School Fund Budget Committee does <u>exactly</u> the same

thing as was done by the Legislative Education Board, with a report to the Commissioner of Education and the Legislature. Then, under § 322.008(b) of the Government Code, which was also amended by Senate Bill 1, the specific dollar numbers adopted by the Foundation School Fund Budget Committee are put in the general appropriations bill "for purposes of information." Duly informed by this cumbersome process, the Legislature then determines appropriations.

The state touts this process as one subject to judicial review. The state points out that the Legislative Education Board is a "board" making "rules" subject to review under the Administrative Procedures Act. The court hesitates to even take the time to say that judicial review is pointless because 1) the board only makes recommendations to the Legislature; and 2) by the time the process of judicial review is concluded, years will have passed. The critical point is that the board is <u>authorized and commanded</u> by Senate Bill 1 to exclude certain revenue from its calculations, thus equalization is provided up to some supposed level of "adequacy" rather than up to what the property-rich districts actually spend.

The state grows self-righteous at any criticism of this process. The state asks: Why should equalization be provided for unnecessary costs? Why should the state provide astroturf, swimming pools, and planetariums for all? Why is it not sufficient to equalize to an adequate level? These questions show that the state still does not understand the evil that the court insists must be remedied.

Consider the following story to illustrate the point. A father has two sons -- John and Javier. He says to each that he will divide his wealth between them equally so that he may spend the same on each. For John he provides food, clothing, shelter, a car, tennis lessons, and pocket money. For Javier he provides food, clothing, and shelter. Javier says to his father, how is this equal? His father answers: This is exactly equal. I have done an accountable cost study and learned that a boy does not need a car, tennis lessons, or pocket money to grow into a fine man. So those costs do not count. I have provided for you and John equally.

This simple story has even more force if the facts are altered slightly. Imagine that the food, clothing, and shelter provided Javier is inadequate, while John's is ample. Or imagine that Javier has special needs John does not have, for example, poor health or learning disabilities. Or imagine that the accountable costs studies of the father are wrong, and that certain special advantages do help boys grow into better men. All of these variations on the story fit the evidence.

Thus, Edgewood continues to be a debate about adequacy and equity. The Legislature continues to try and define adequate as something less than the elected school boards charged with the responsibility to educate our children say they need to do the job. Of course, the Legislature does not give a thought to prohibiting rich districts from spending money on what the Legislature refers to as "astroturf." Instead it refuses to fund what it calls "astroturf" for the poor districts.

The truth is that "astroturf" does not account for much of the difference between the rich and the poor. The state introduced no evidence that the Foundation School Program even yet provided an adequate minimum. The basic allotment set in Senate Bill 1 for 1990-91 is $1910. The state's own research at the time the basic allotment was set shows that it should have been $2100. In a classroom of 22, this $190 difference is $4180. The state also introduced no evidence that all or even most legitimate educational needs could be met by the Foundation School Program in combination with the Guaranteed Yield Program.

In short, what the rich districts spend creates educational opportunities for their children that are denied the children of the poor districts. Under Senate Bill 1, the rich districts are left rich, the poor districts poor. The rich can still raise revenue through local property taxes that the poor cannot. The poor will receive state funds to equalize the difference, but only up to a level of bureaucratically and legislatively determined "adequacy," not to the level of the real difference in educational opportunity.

4. Continuation of Unequal Enrichment in Tier 3

Even after full implementation at maximum funding levels, Senate Bill 1 equalizes only up to $1.18 in the second tier. Senate Bill 1 does nothing to equalize or restrict use of the third tier. The third tier will continue to make available enormous wealth for property-rich districts that will not be matched by the state for property-poor districts. To see the

advantages the property-rich districts have under Senate Bill 1, one has only to look at tax rates above $1.18.

The richest district under the Senate Bill 1 umbrella (95th percentile of wealth) for a penny of tax rate above $1.18 will be able to raise and spend $31.00 per weighted student, while the poorest district under the Senate Bill 1 umbrella for a penny of tax rate above $1.18 will only be able to raise and spend $1.00 per weighted student.

The districts at the 90th to 95th percentile in wealth, containing 150,000 students, will be able to raise and spend $26.00 per weighted student per penny of tax rate above $1.18. The poorest districts (bottom 5%), containing 150,000 students, will only be able to raise and spend $3.00 per weighted student per penny of tax rate above $1.18.

The districts at the 75th to 95th percentile in wealth, containing 600,000 students, will be able to raise and spend $22.00 per weighted student per penny of tax rate above $1.18, compared to the poorest districts (bottom 20%), containing 600,000 students, which will be able to raise and spend only $5.00 per weighted student per penny of tax rate above $1.18.

Under Senate Bill 1, at the state's maximum tax rate of $1.50 for maintenance and operations, of the twelve school districts in Bexar County, two -- Northeast I.S.D. and Alamo Heights I.S.D. -- will be able to raise and spend $4300 per weighted student for maintenance and operation. One district, Northside I.S.D., will be able to raise and spend $4075 per weighted student; two districts, Judson I.S.D. and East Central

I.S.D., will be able to raise and spend $3850 per weighted student; five districts, San Antonio I.S.D., South San Antonio I.S.D., Somerset I.S.D., Southwest I.S.D., and Southside I.S.D., will only be able to raise and spend $3700 per weighted student; and two districts, Harlandale I.S.D. and Edgewood I.S.D. will only be able to raise and spend $3600 per weighted student. These revenue disparities within the same county are based solely upon the continued disparities of taxable wealth contained within the boundaries of the various school districts. The same pattern of disparity in resources can be found in all of the other major urban counties, as well as the majority of the counties throughout the state.

To justify these results, the state leans heavily on the following language from the Supreme Court:

> [The requirement of an efficient system does not] mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local enrichment must derive solely from local tax effort.

Edgewood, 777 S.W.2d at 398. The state interprets this language as authorizing unequal enrichment from tier 3 as long as tiers 1 and 2 are equitable and adequate.

The court rejects this gloss. The Supreme Court merely restated what this court had already said in its Final Judgment of June 1, 1987, at page 6:

> Nothing in this Judgment is intended to limit the ability of school districts to raise and spend funds for education greater than that raised or spent by some or all other school

> districts, so long as each district has available, either through property wealth within its boundaries or state appropriations, the same ability to raise and spend equal amounts per student after taking into consideration the legitimate cost differences in educating students.

A fiscally neutral system will have disparities in revenue spent per pupil. Local districts will spend different amounts based upon community priorities. The point of Edgewood, however, is that the differences should not be the result of disparate wealth. Thus, the Supreme Court expressly provided that "local enrichment must derive solely from tax effort," as opposed to greater available wealth.

To accept the state's argument is to adopt a standard of adequacy rather than equity. The state would be free to fund tiers 1 and 2 equitably, but at any level it deemed adequate, and then label the local districts' use of tier 3 "supplementation" of an efficient system. If that is what the Supreme Court meant, it would have reversed rather than affirmed this court.

5. Cycles of Funding

At best Senate Bill 1 chases equity. As the rich draw from tier 3, the relationship between revenue and wealth at some point becomes "statistically significant" in the judgment of the Legislative Education Board and the Legislative Budget Board. Based upon data from the last biennium, they recommend adjustments in the present biennium, to be effective in the next biennium. The Legislature makes the adjustment. The poor catch

up to where the rich were four years ago. In the meantime, the rich have moved forward again. Such cycles of funding do not begin to provide equity.

Before Senate Bill 1, the history of the Texas school finance system could be fairly described as one in which substantial disparity in educational resources existed because of disparities in local taxable wealth. Periodically the state would recognize the disparities and attempt to correct them by the infusion of additional state dollars, which would temporarily close the gap between resources available to rich and poor. Over time, because of the superior tax base available to the wealthier districts, the gap would widen again. Senate Bill 1 does nothing to prevent this same pattern from recurring and, in fact, contemplates the continuation of the pattern. Senate Bill 1 writes history into law.

6. The False Hope of Reaching Adequacy

The state reasons that such cycles must grow smaller or stop as adequacy is finally achieved. The state points out that under Senate Bill 1 the basic allotment of tier 1 will increase from its present $1477 to $1910 in 1991 and $2128 thereafter, and that the guaranteed yield of tier 2 will increase from its present 34¢ per $100 up to 70¢ to 55¢ per $100 up to 91¢ in 1991 and 71¢ per $100 up to $1.18 thereafter. As tier 1 and tier 2 grow under Senate Bill 1, the state reasons, local districts will not use tier 3, or not use it much.

This hypothesis is false for three reasons. First, districts compete against each other. As the poor benefit from increases in tier 1 and tier 2, those districts with access to tier 3 will use it to stay ahead. Second, the state program has historically been behind inflation. As costs go up, those districts who rely upon tier 1 and tier 2 will be squeezed, while those districts with access to tier 3 will use it to meet increased costs.

Finally, and most important, the state has so many unmet educational needs and spends so little on education that one can safely predict that those districts with access to tier 3 will continue to use it to supplement the state's inadequate program. While care must be taken in comparing national averages, it is startling to learn that the Texas district at the 95th percentile of revenue per student spends less than the national average per student. The district at the 95th percentile spends $4600 per student. The national average is $4800 per student.

Any perception that Senate Bill 1 flooded the school districts with so much money that unequal enrichment from tier 3 is no longer a concern would be seriously mistaken. The taxable property wealth of Texas is about $631 billion. The state and school districts combined spent approximately $12 billion in 1989-90, excluding debt service. Senate Bill 1 added about $518,000 for 1990-91, an addition of only 4%. Of this, $65,000,000 is to make up for shortfalls in funding due to unplanned for increases in enrollment, and $159,000,000 goes to

districts above median property wealth. Only about $300,000,000 new state dollars will be sent to districts below median property wealth.

Senate Bill 1 is projected to add about $1.2 billion in 1994-95, an addition of 10%. During the five school years between 1989-90 and 1994-95, however, inflation is projected to drive the cost of education up significantly higher than 10%. Thus, as noted, Senate Bill 1 will not even keep pace with inflation.

7. Facilities

One of the big advantages that property-rich districts have is the ability to fund facilities. As facilities are needed or desired, the property-rich districts merely draw on tier 3 to pay for the facility or service debt. The property poor are left in difficult circumstances. Historically there have been no state allotments for facilities or debt service. Edgewood, 777 S.W.2d at 392. Senate Bill 1 addresses this problem by providing for modest equalization in tier 2 for debt service and some modest grant funds for facilities. The root problem, however, remains. Some districts have vast local wealth to build facilities, others do not.

One of the most persuasive briefs in this case was filed by Klein Independent School District as amicus curiae. [illegible] points out that the dispute in this case is [illegible] between rich and poor people but between [illegible] districts. Klein serves a community of [illegible]

it is a poor district because its tax rolls consist of almost exclusively residential property. Being a desirable place to live, it has grown tremendously. In 1970, Klein had 1600 students. In 1990, Klein has 26,000 students. Klein is the 25th largest district in the state, yet it is 461st in wealth per student. As a result, it has not been able to properly fund its educational program because of the strain of building facilities. Klein urges that Senate Bill 1 be struck down [illegible] that local tax bases be shared or local taxes elimin[illegible] Brief of Amicus Curiae Klein Independent Schoo[illegible] August 14, 1990.

The Progreso I.S.D., one of the [illegible] dramatizes the problem. Progreso [illegible] one of the state's fa[illegible] its enrollment by [illegible] district, like [illegible] a 22-[illegible] d[illegible]

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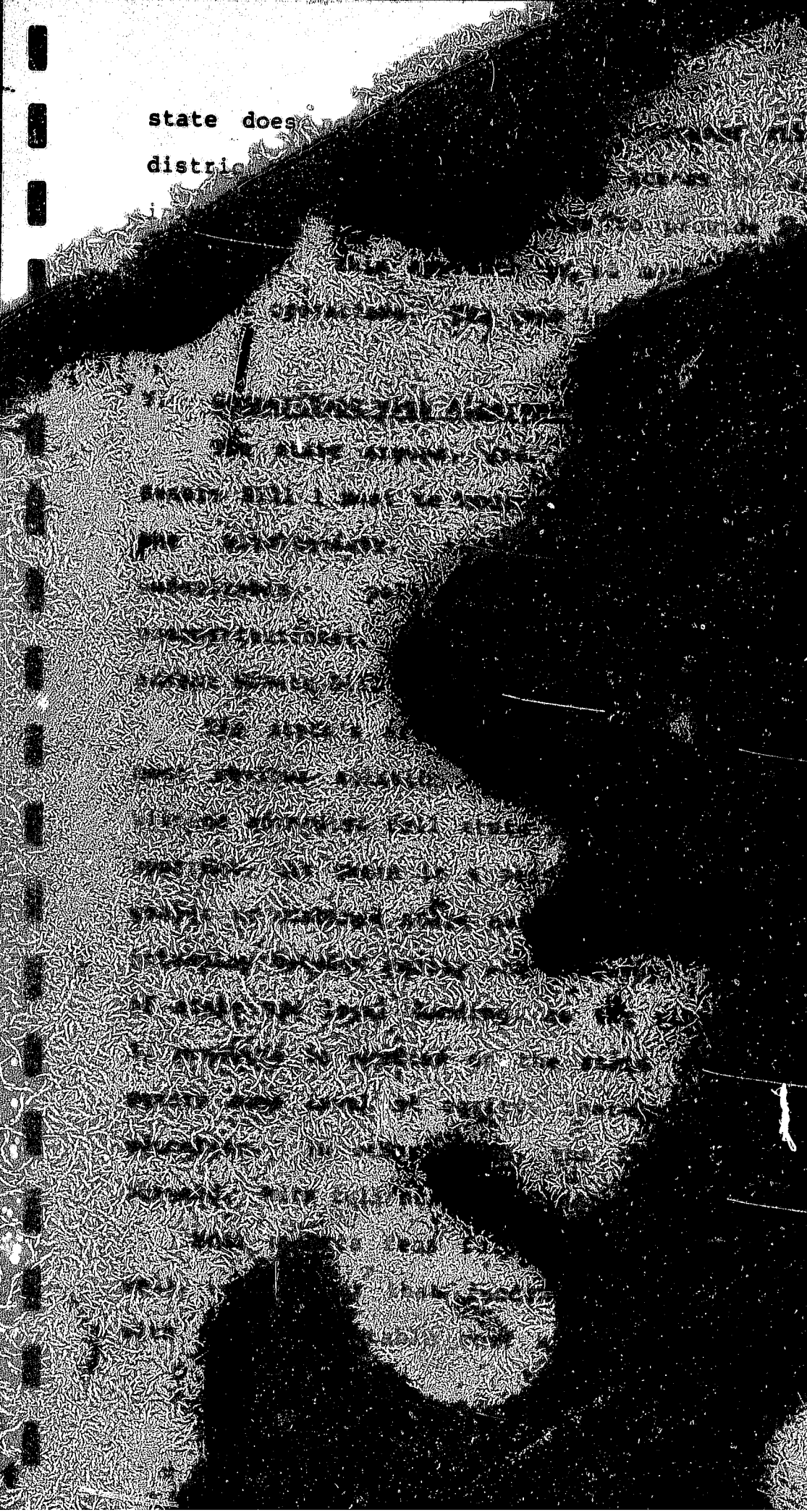

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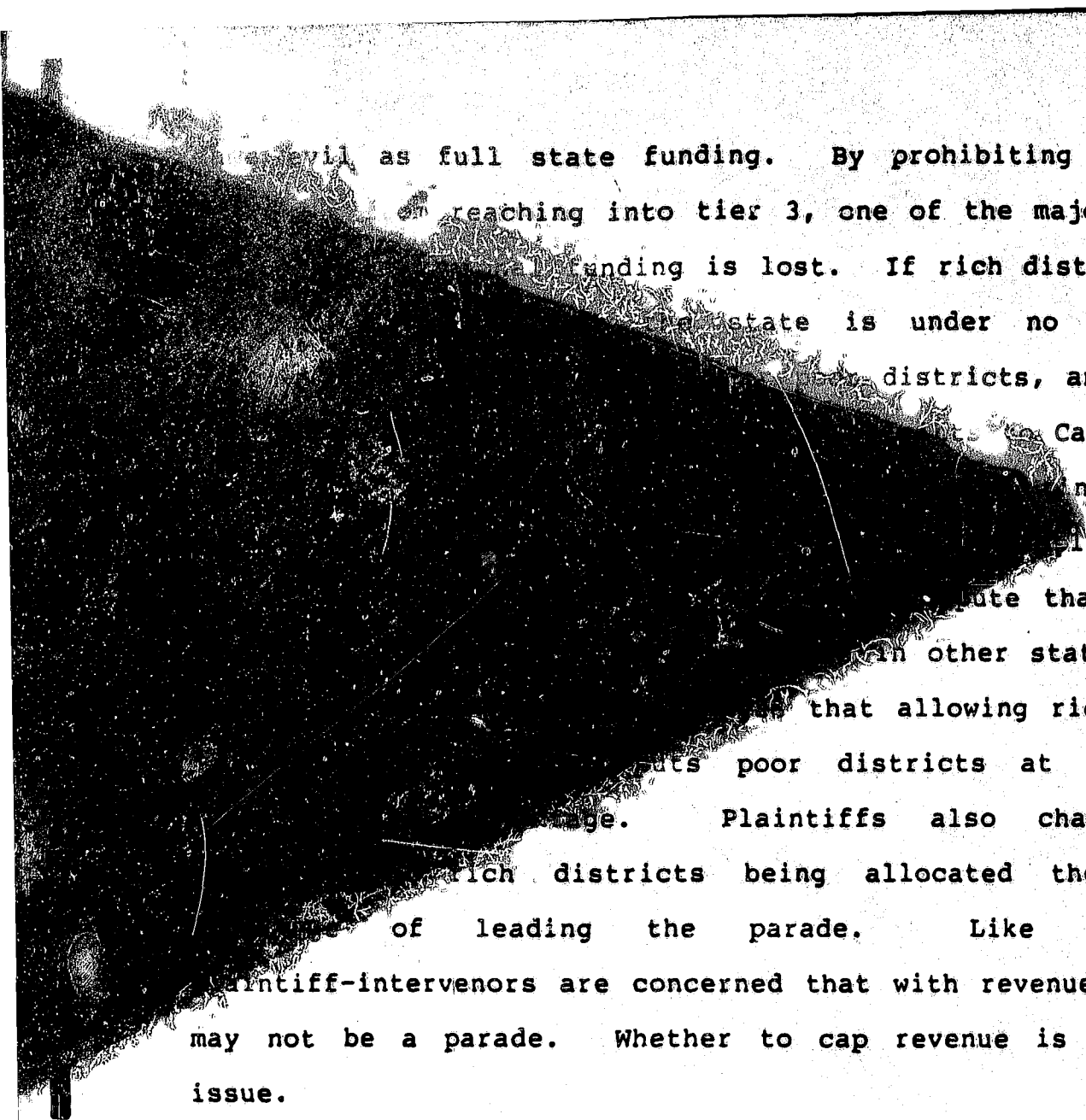

evil as full state funding. By prohibiting rich school reaching into tier 3, one of the major pulls for funding is lost. If rich districts cannot state is under no pressure to districts, and the drive California and ng growth. lit on this ute that the state other states. As for that allowing rich districts poor districts at a perpetual ge. Plaintiffs also chaff at the rich districts being allocated the perennial of leading the parade. Like the state, intiff-intervenors are concerned that with revenue caps there may not be a parade. Whether to cap revenue is a difficult issue.

The last major alternative is an equalization plan of some sort without revenue caps. The state characterizes Senate Bill 1 as such a plan. Thus, the state concludes, Senate Bill 1 must be accepted as the only reasonable alternative.

To this conclusion, the court has two responses. To begin with, the court has more hope for the leadership and ability of the next Governor and the 72d Legislature. Perhaps they can develop a plan of full state funding that provides adequate dollars and retains an appropriate measure of local control.

Perhaps they can develop popular support for significant consolidation. Perhaps they can solve the technical legal issues regarding tax base consolidation or secure a constitutional amendment to allow tax base consolidation. Perhaps they can develop an altogether new plan. It is not yet time to say we can do no better for the children of Texas.

Beyond that, if an equalization plan without caps is the only solution, Senate Bill 1 is not an acceptable version. A much more equitable plan can be developed. For example, the Equity Center proposes a "floating cork" plan that provides substantially equal access. Such a plan would 1) equalize to some point such as the 95th percentile of wealth for 95% of the students; 2) do so within a reasonable number of years; 3) include all state and local revenue; and 4) require biennium-to-biennium adjustments based upon where collective local decisions have placed the 95th percentile of wealth during the preceding biennium.

The state argues that such an equalization plan gives school districts "a draw on the treasury." To the extent that the state means that under such a plan the state's share is determined by what the collective decisions of 1056 school boards show is needed to fund education, the state is correct. Any equalization plan that ensures equity does just exactly that. In simple terms: the rich spend local tax dollars from their property-rich tax base; the state sends the poor the same amount from state taxes. Thus, the draw on the treasury. The only reason that Senate Bill 1 is not a draw on the treasury is

because it does not ensure equity. Under Senate Bill 1, the poor are not sent what the rich spend.

A true equalization plan is expensive for the state. In a true equalization plan, the state subsidizes some waste through the maintenance of small districts and subsidizes some extravagance by the concentration of property wealth in certain rich districts. In addition, the state funds through state taxes what could be funded by local taxes if local tax bases were substantially equal. If the Legislature chooses these financial inefficiencies and prefers state taxes to local taxes, that is its choice.

The critical point to understand is that a true equalization plan does not create any inefficiencies, it merely exposes them. The inefficiencies are the result of 1056 districts with great variations in student size and property wealth. For decades the inefficiencies have been subsidized by the property-poor school districts and their children who have gone without so that others could have more. Forcing the poor to subsidize these inefficiencies is not a choice available to the Legislature.

Likewise, a true equalization plan does not create the need for educational revenue, it merely allows all 1056 districts the opportunity to tax to meet their needs, rather than just the property-rich districts. Providing for the rich a not the poor is also not a choice available to the Legislatu

VI. Exclusions

At this juncture the court returns to where it began, the exclusion of students from an equalization plan. No equalization plan can equalize to the 100th percentile of revenue for 100% of the students. Such a plan would cost the extraordinary sum of $179.1 billion per year. Every equalization plan that has been considered excludes some students. Plaintiffs and the state are in bitter disagreement about whether any students can be excluded under the Supreme Court's test, and, if so, how many.

Plaintiffs argue that each district must have substantially equal access as compared to every other district. Plaintiffs interpret the word "substantially" and "similar" to mean "not exact but on the same order of magnitude." Their view of the test envisages district consolidation or tax base sharing with slight variations in access necessitated by the inability to precisely divide property wealth between districts or tax bases, or an equalization plan that equalizes to something like the 99th percentile of revenue for 99% of the students.

The state argues that all that is required is substantially equal opportunity, and that the Legislature is free to draw reasonable lines to define what is substantially equal opportunity. The state interprets "substantially" and "similar" to mean something like "equal access up to the point that the revenue available to one district but unavailable to another district makes little or no real difference in educational opportunity." This view of the test would allow for an

equalization plan without caps at something less than the 99th percentile for 99% of the students.

As the court has already noted, any real equalization plan is expensive. Even an equalization plan that equalizes at the 97th percentile for 97% of the students would cost $3.8 billion a year over the state's cost in 1989 of $5.3 billion, an increase of 71%. A plan that equalizes to the 95th percentile for 95% of the students would cost $2.8 billion more, an increase of 53%. Of course, the cost of equalization can be controlled with caps, but caps raise the policy concerns discussed earlier. In the long run, all districts might be better off with less equalization without caps than more equalization with caps.

Once the court allows for doing less than equalizing to the 100th percentile of wealth for 100% of the students, where does the court draw the line? What level of fiscal neutrality is required? This court does not take the holy writ approach of plaintiffs to the test of fiscal neutrality. The goal of the constitution is not fiscal neutrality, but efficiency. Fiscal neutrality is merely a test for efficiency. Moreover, the goal is not efficiency for the sake of efficiency, but because efficiency produces the general diffusion of knowledge essential to the preservation of our liberties and rights.

Putting the test of fiscal neutrality in its proper place, one concludes that it is not to be applied rigidly. The Supreme Court itself used more general terms when it said: "Children who live in poor districts and children who live in rich

districts must be afforded a substantially equal opportunity to have access to educational funds." Edgewood, 777 S.W.2d at 397. A dollar for dollar match is not required. Substantially equal opportunity is.

The difficult question is whether a particular equalization plan provides substantially equal opportunity. At least in the first instance, that question must be answered by the Legislature. A legislative determination as to what is a "suitable provision for the support and maintenance of an efficient system of public free schools" is presumed constitutional. An equalization plan at less than the 99th percentile for 99% of the students is not inherently inefficient. As long as the line drawn provides substantially equal opportunity, such a plan remains an option for the Legislature to consider. The court hastens to say that it does not want to be misunderstood. The court is not abandoning or weakening the test of equity. The court is only saying that the Legislature can draw reasonable lines.

VII. Change in Method of Calculating Average Daily Attendance

Senate Bill 1 changes the method of calculating average daily attendance. Before Senate Bill 1, ADA was calculated by taking the average daily attendance for the best four of eight weeks in the fall or spring. Under Senate Bill 1, ADA will be calculated by taking the average daily attendance for the full year.

Plaintiffs complain that this change will result in reduced funding for property-poor school districts because these districts have a more difficult time in maintaining attendance. Plaintiffs also charge that the change was motivated by a desire to reduce cost. Plaintiffs reason that full year ADA will be lower than best-four-of-eight weeks ADA thereby resulting in fewer state dollars going to the school districts. Plaintiffs assert that the change will result in a $90 million savings to the state with the loss being borne primarily by the property-poor districts.

The state responds that the change was motivated by a desire to eliminate abuses in some districts of ADA. The state asserts that some districts would offer special incentives to attract children to school during the designated best-four-of-eight weeks. Having raised their ADA to maximize state funding, the state says these districts would then "push out" students to reduce true ADA to a manageable level. The state denied that the motive for the change was to reduce cost.

Data on full-year ADA was last available for the 1984-85 school year. While the data is six years old, which makes the court hesitant to draw conclusions from it, the data does suggest that any loss in state funds due to the use of full-year ADA will be more or less evenly distributed across the wealth groups. With the exception of Houston I.S.D., the data shows a similar loss in each wealth group. Every group's ADA goes down, and roughly the same percentage. If full-year ADA for 1990-91

follows the same pattern as 1984-85, the change would be wealth neutral.

The court does not believe it proper to question legislative motivation. The court must assume the best of motives on the part of an equal branch of government. Thus, the court assumes that the change in the calculation of ADA is designed to encourage districts to maximize attendance throughout the year. Furthermore, plaintiffs have failed to establish that the change will have a disproportionate impact on property-poor districts.

This debate about ADA illustrates an important point concerning fiscal neutrality. State funds are distributed to districts through a complex formula that not only uses ADA, but also allocates different amounts per student based upon the "weight" of the students for that district. The Supreme Court has recognized that the state may take into account "differences . . . in cost associated with providing equalized educational opportunity to atypical or disadvantaged students." Edgewood, 777 S.W.2d at 398. What the weight per student should be is a difficult legislative judgment. Formulas to take these differences into account are imprecise at best. They are also subject to constant study and adjustment, as well as criticism.

In an inequitable funding system, property-poor districts will be quick to bring their complaints about the formulas to court. In an equitable funding system, districts need not be so concerned about the marginal impact of changes in methodology to determine ADA or student weights. In a generally fiscally

neutral system, marginal effects can be tolerated because they can be cushioned by local funds. For example, Dr. Hooker, an expert called by plaintiff-intervenors, admitted that full-year ADA would be a tolerable policy choice in an equitable system. Rather than tinker with ADA, which might only invite other attacks on funding formulas, this court continues to insist on fundamental change to produce equity.

VIII. Priority Funding

Plaintiffs also complain that the Legislature has not established a system of priority funding for education. This complaint is based on the following language from the Supreme Court's opinion in Edgewood:

> In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an "if funds are left over" basis. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed.

Edgewood, 777 S.W.2d at 397-98. Pointing to this [illegible] plaintiffs argue that the Supreme Court held [illegible] education is mandatory and must be a pr[illegible] step further and argue that [illegible] provide for this priority [illegible] argument, they say that [illegible] unconstitutional [illegible]

In support of their argument, plaintiffs point to how educational revenues and appropriations have been handled in the recent past. In 1941, the Legislature for the first time passed a law that placed most revenue into a fund called the [illegible] Tax Clearance Fund. Revenues were placed into [illegible] then moved to other funds on a priority basis [illegible] priority for educational funding except [illegible] dedicated Available School Fund.

Then in 1949 three [illegible] became known as the [illegible] 117 created a [illegible] Fund for [illegible] priority [illegible]

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[illegible] ...school finance as
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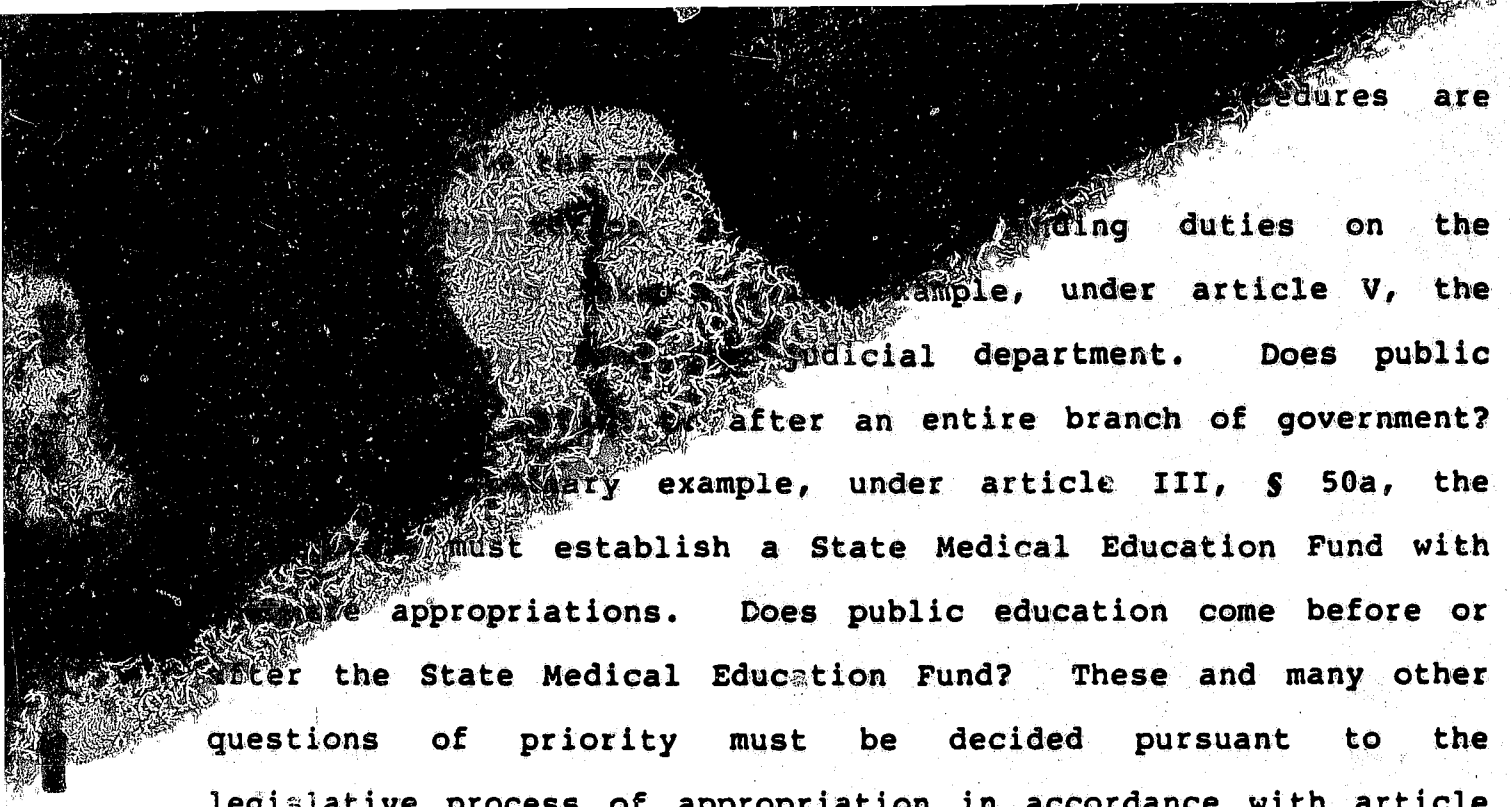
Of course, the court is also loath to act because its options are so unattractive. Cutting off all funds to force legislative action throws the process of education into chaos and does damage to both students and teachers. Furthermore,



...edures are ...ding duties on the ...ample, under article V, the ...udicial department. Does public ... after an entire branch of government? ...ary example, under article III, § 50a, the ...must establish a State Medical Education Fund with ...e appropriations. Does public education come before or ...ter the State Medical Education Fund? These and many other questions of priority must be decided pursuant to the legislative process of appropriation in accordance with article VIII, § 6.

IX. Relief Granted

In its judgment the court has done nothing more than declare that the Texas School Financing System remains unconstitutional. The court has given the Legislature an additional year beyond the three years it has already been given to meet its constitutional responsibilities. Plaintiffs may well criticize the court for acting too timidly and moving too slowly. The court, however, is convinced that it is acting with appropriate forcefulness and moving with appropriate speed.

Just as the judiciary is quick to remind the legislative and executive departments that the judiciary is a separate, equal branch of government, so too must the judiciary remember that the legislative and executive departments are each separate

cutting off funds imperils the credit of the state because of the contractual obligations of the districts. These problems can become severe quickly if a stubborn Legislature or Governor refuse to act.

A judicially imposed remedy has its own problems. Courts are not designed to legislate or administer and cannot appropriate money. Any judicial remedy would therefore be less effective when implemented than a legislative solution. Undoubtedly, judicial action is far less desirable than legislative action.

Having stated the case for continued deference to the legislative and executive departments, the court wants to say loudly and clearly that it can not and will not forebear drastic action after September 1, 1991. As the Supreme Court said in October 1989: "A remedy is long overdue. The legislature must take immediate action." Edgewood, 777 S.W.2d at 399.

Senate Bill 1 provides too little equity to justify much delay. The problems of our poor school districts remain as disturbing today as when this case began.

Moreover, delay is particularly intolerable because the court has made no provision for remediation. The court has only ordered that equity be provided prospectively. Any equitable system that is established will be built on top of a system that has been inequitable for decades. The court has not ordered that the property-rich schools be stripped of what their decades of special advantages have bought. Once equity in the

distribution of funds is achieved, those who formerly had special advantages will continue to enjoy their fruits.

In short, the 72nd Legislature must act. It must act so that an efficient system goes into operation on September 1, 1991. Given the complexity of creating an efficient system, staged implementation after September 1, 1991, is probably a necessity. The time over which implementation is to be accomplished, however, must be reasonable. Any plan must also be sufficiently detailed so that its likely efficiency can be assessed on September 1, 1991. A vague or incomplete plan is no plan.

If the Legislature continues to abdicate its responsibility, or if the Governor impedes legislative action, then upon appropriate motion and proof the court will act. Pursuant to its constitutional authority, and in discharge of its own constitutional responsibilities, the court has interpreted and applied the constitution. Marbury v. Madison, 5 U.S. 137 (1803). Having done so, the court must and will make its judgment effective.

X. Attorneys Fees

Plaintiffs seek recovery from defendants in their official capacities the reasonable and necessary attorneys fees plaintiffs incurred in prosecuting this case. Under the American Rule, a successful plaintiff pays his own attorneys fees unless his case comes within one of the exceptions to the rule. Alyeska Pipeline Service v. Wilderness Society, 421 U.S.

240, 95 S.Ct. 1612 (1975). The exception relied upon by plaintiffs in this case is statutory. They claim an entitlement to attorneys fees under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code, § 37.009.

Defendants, however, plead that their official immunity and the state's sovereign immunity bar an award under the Uniform Declaratory Judgments Act. Defendants' assertion of official immunity has no application to this case because defendants have not been sued in their individual capacities. See Baker v. Story, 621 S.W.2d 639, 643 (Tex. App.--San Antonio 1981, writ ref'd n.r.e.); Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978). Plaintiffs do not seek a judgment against defendants personally.

What plaintiffs seek is a judgment against defendants in their official capacities, meaning a judgment to be paid by the state. To this, defendants have properly plead the state's sovereign immunity. See Answer of State Defendants to Plaintiffs' and Plaintiff-Intervenors' Request for Additional Relief, ¶ IV-VI, filed June 29, 1990.

The Uniform Declaratory Judgments Act itself does not waive sovereign immunity. TDHS v. Methodist Retirement Services, Inc., 763 S.W.2d 613, 614 (Tex. App. -- Austin 1989, no writ); City of Houston v. Lee, 762 S.W.2d 180, 188 (Tex. App. -- Houston [1st Dist.] 1988, writ granted, 33 Tex. Sup. Ct. J. 615 (June 30, 1990)); TEC v. Camarena, 710 S.W.2d 665, 671 (Tex. App. -- Austin 1986), rev'd on other grounds, 754 S.W.2d 149 (Tex. 1988). For a court to read a statute as waiving immunity,

the statute must explicitly provide that immunity is waived. The general language of the Uniform Declaratory Judgments Act does not.

At this point, though, a second statute comes into play. In chapter 104 of the Texas Civil Practice and Remedies Code, the state provides for a limited waiver of sovereign immunity with regard to attorneys fees. Section 104.001(1) provides that the state shall indemnify an officer of the state for attorneys fees adjudged against him for certain enumerated causes of action. Section 104.001(2) lists a class of actions into which this case falls. Specifically it provides for indemnity by the state for an award of attorneys fees against an officer of the state based on an act or omission by the officer in the course and scope of his employment when the act or omission is a deprivation of a right secured by the constitution of this state. Section 104.003 limits state liability to $100,000 to a single person and $300,000 for a single occurrence.

The state argues that chapter 104 does not apply to this case because it is an indemnification statute designed merely to indemnify state officers for awards against them in their individual capacity. To understand this argument one must know the history of chapter 104.

In 1975, the state enacted Senate Bill 704, which became Tex. Rev. Civ. Stat. Ann. art. 6252-26, popularly called the Official Indemnity Act. Senate Bill 704 provided that the state "shall pay actual damages adjudged against" certain state officers in certain circumstances. Acts 1975, 64th Leg., p.

799, ch. 309. Senate Bill 704 did not create a cause of action against the officer; rather, it merely provided that the state would pay certain damages adjudged against certain state officers in certain circumstances. Therefore, while it did not use the term indemnity, it did create a cause of action against the state if a judgment against an officer was obtained that came within the terms of the act.

In 1977, the state amended article 6252-26 to provide that the state "is liable for and should pay" certain damages against certain officers in certain circumstances. After this amendment, article 6252-26 still did not create a cause of action against the officer; it still merely provided that the state would pay certain damages adjudged against the officer. Again, a cause of action against the state was created upon obtaining a judgment against an officer within the terms of the act. Acts 1977, 65th Leg., p. 730, ch. 273. In 1981, further amendments not relevant to the question under discussion were passed. Acts 1981, 67th Leg., p. 2274, ch. 553.

Then in 1985, article 6252-26 was repealed, and in a nonsubstantive revision its provisions were codified into chapter 104 of the Texas Civil Practices and Remedies Code. Acts 1985, 69th Leg., ch. 959, p. 3242, p. 3308-09, p. 3322.

Based upon chapter 104 as it was in 1985, in an unanimous opinion by Chief Justice Hill, in TSEU v. TDMHMR, 746 S.W.2d 203, 207 (Tex. 1987), the Supreme Court held that chapter 104 waived the state's immunity to attorneys fees adjudged against a defendant state officer in his official capacity if the judgment

is based upon a cause of action that comes within its terms. TSEU v. TDMHMR was followed by the Court in Camarena v. TEC, 754 S.W.2d 149, 151 (Tex. 1988), though again the Supreme Court was interpreting chapter 104 as it was in the 1985 version. Edgewood falls squarely within the 1985 version of § 104.002(2) of chapter 104 as interpreted by the Supreme Court in TSEU and Camarena.

Defendants, however, argue that legislative amendments were passed to overturn TSEU and Camarena. Specifically, in 1987, the Legislature enacted the following amendment of § 104.001:

> In a cause of action based on conduct described in Section 104.002, the state shall indemnify the following persons [~~is liable~~] for . . . attorney's fees . . . .

Acts 1987, 70th Leg., 1st Called Sess., ch. 2, § 3.08, p. 49-50. Defendants argue that this change in language from "is liable" to "shall indemnify" means that the state has reclaimed the immunity that TSEU and Camarena hold was waived.

The distinction between "shall indemnify" and "is liable" is subtle but perhaps significant. The state argues that chapter 104 creates no causes of action against a state officer, but merely indemnifies him for personal liability to which he is subjected under some other law such as state tort or federal civil rights law. Because defendants in this case have no personal liability, indeed have not even been sued in their individual capacities, the state argues that attorneys fees cannot be assessed against them personally and thus there is no indemnification owed under chapter 104.

The Austin Court of Appeals adopted the state's position in TDHS v. Methodist Retirement Services, Inc., 763 S.W.2d 613, 614-15 (Tex. App. -- Austin 1989, no writ). While this court has doubts about the merits of the state's argument, it would have to follow the Austin Court of Appeals' decision in TDHS, were the 1987 amendments and thus TDHS applicable to this case, but they are not.

The 1987 amendments were enacted by Senate Bill 5. Senate Bill 5 is divided into four articles. The amendments to Chapter 104 are found in article 3. The effective date provisions are found in article 4.

Article 4, § 4.05, of Senate Bill 5, provides in pertinent part:

> Section 4.05. EFFECTIVE DATE. (a) Sections 2.01 through 2.12 and Article 3 of this Act apply only to suits filed on or after the effective date of this Act.
>
> (b) If all or any part of a suit is filed before the effective date of this Act, the entire suit shall be governed with respect to the subject matter of Sections 2.01 through 2.12 and Article 3 of this Act by the applicable law in effect before that date, and that law is continued in effect only for this purpose, including any new trial or retrial of any such suit following appeal of the trial court's judgment.

Thus, under the terms of Senate Bill 5, article 3, which amends Chapter 104, applies only to cases filed after the effective date of Senate Bill 5. The effective date of Senate Bill 5 was September 2, 1987. All cases filed before that date continue to be governed by the terms of chapter 104 before its amendment in

1987, in other words, chapter 104 as interpreted by the Supreme Court in TSEU and Camarena.

Edgewood was filed in 1984. While the motions now before the court were filed in 1990, the law applicable to this case is nevertheless chapter 104 as it was in 1985. The Legislature could not have made its intention clearer when it provided that the "entire" case would be governed by chapter 104 before amendment "if all or any part" of the case was filed before September 2, 1987. Thus, the court must apply TSEU and Camarena rather than TDHS.

To summarize: 1) the Uniform Declaratory Judgments Act, § 37.009, authorizes an award of attorneys fees against a state officer in his official capacity but for sovereign immunity; 2) at least the 1985 version of chapter 104 waives the state's sovereign immunity against an award of attorneys fees up to the limits of the chapter for a case within the terms of the chapter; and 3) the two statutes in combination therefore authorize an award of attorneys fees against defendants in their official capacities in this case.

In determining the amount of attorneys fees one must remember that even the 1985 version of chapter 104 does not create a cause of action for attorneys fees, it merely waives the state's immunity if there is a cause of action for attorneys fees. The cause of action for attorneys fees is created by the Uniform Declaratory Judgments Act. Any recovery is therefore limited to what is provided by the Uniform Declaratory Judgments Act, § 37.009, which provides: "In any proceeding under this

chapter, the court may award reasonable and neces
fees as are equitable and just."

Equity and justice demand an award o
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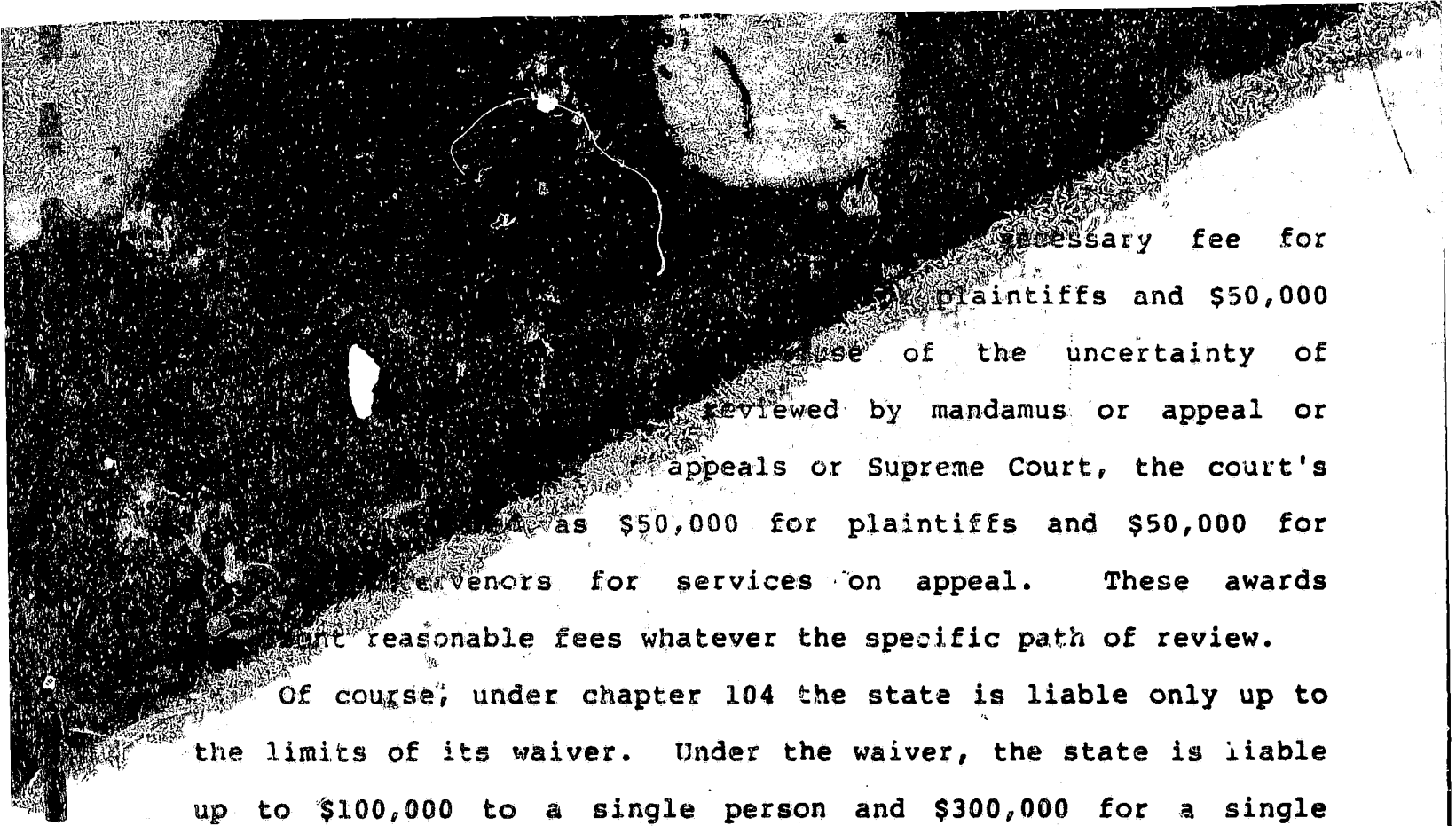

...essary fee for ... plaintiffs and $50,000 ...se of the uncertainty of ...reviewed by mandamus or appeal or ... appeals or Supreme Court, the court's ... as $50,000 for plaintiffs and $50,000 for ...ervenors for services on appeal. These awards ...nt reasonable fees whatever the specific path of review.

Of course, under chapter 104 the state is liable only up to the limits of its waiver. Under the waiver, the state is liable up to $100,000 to a single person and $300,000 for a single occurrence. With as many plaintiffs and plaintiff-intervenors as there are who are liable to counsel for payment of fees, no one plaintiff or plaintiff-intervenor stands to recover more than $100,000, and with the total recovery awarded by the court

the judgment therefore comes within

and plaintiff-intervenors did collect in excess
mits under the original judgment. That earlier award,
ever, was made before the state asserted its immunity. See
Order of January 19, 1990; Davis v. City of San Antonio, 752
S.W.2d 518 (Tex. 1988). Sums awarded under a prior judgment
before the state asserted its immunity are logically not counted
toward the limit under a second judgment after the state asserts
its immunity. Thus, this judgment comes within the limits of
chapter 104.

The court finds it would not be equitable or just to allow plaintiffs or plaintiff-intervenors to recover fees from defendant-intervenors. Defendant-intervenors have not increased the cost of litigation to plaintiffs much if any beyond what they would have incurred against just the state. Moreover, the perspective and expertise of defendant-intervenors has been helpful to the court. The court would not want them to abandon this litigation for fear of exposure to liability for attorneys fees. See Edgewood I.S.D. v. Kirby, 777 S.W.2d at 398-99.

XI. Court Costs

Pursuant to Texas Rules of Civil Procedure 131, plaintiffs and plaintiff-intervenors are entitled to recover all court costs from defendants in their official capacities. Thus, court costs are to be paid by the state. Sovereign immunity is no bar. Lane v. Hewgley, 156 S.W. 911, 913 (Tex. Civ. App. -- San Antonio 1913, no writ).

XII. Interest

Pursuant to Tex. Rev. Civ. Stat. Ann. art. 5069-1.05(2), plaintiffs and plaintiff-intervenors are entitled to recover post-judgment interest on their awards of attorneys fees and court costs from defendants in their official capacities. Thus, interest is to be paid by the state. Sovereign immunity is no bar. Franklin Bros. v. Standard Mfg. Co., 78 S.W.2d 294, writ dismissed, 112 S.W.2d 1035 (Tex. 1938). See also Poston v. Poston, 572 S.W.2d 800, 803-04 (Tex. Civ. App. -- Houston [14th Dist.] 1978, no writ).

XIII. Finality

The court's judgment is final and reviewable. See State of Washington v. Williams, 584 S.W.2d 260, 261-62 (Tex. 1979).

XIV. Conclusion

Our need for education is too great and our wealth too modest for inequitable funding of our schools to be tolerated. Our founders wisely required our Legislature to equitably distribute our resources for a general diffusion of knowledge to ensure our liberties and rights. That task awaits the 72d Legislature.

SIGNED this 11th day of September, 1990.

F. Scott McCown

F. Scott McCown
Judge Presiding

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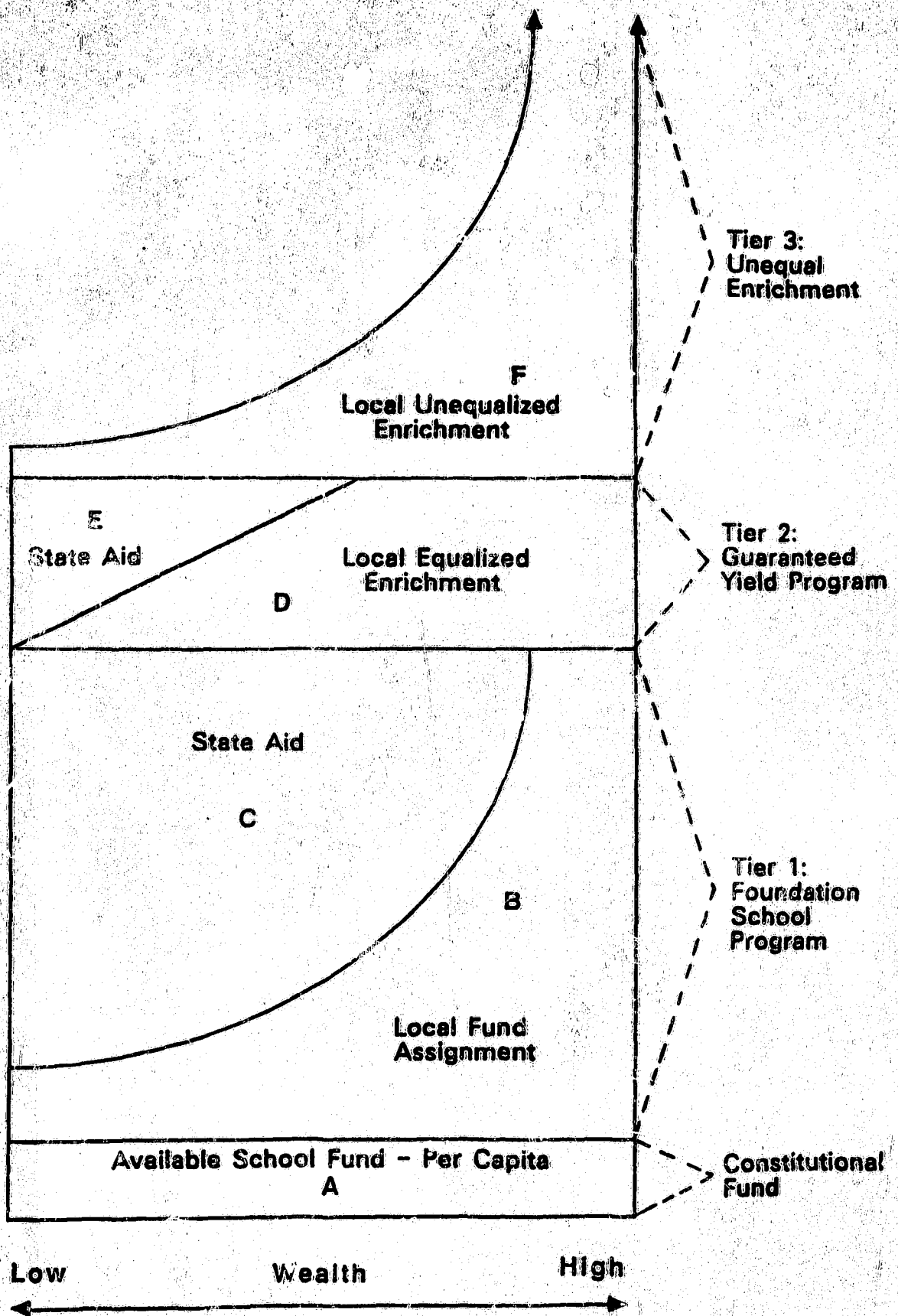
TEXAS SCHOOL FINANCING SYSTEM



NO. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.	§	IN THE DISTRICT COURT
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
WILLIAM N. KIRBY, TEXAS COMMISSIONER OF EDUCATION, ET AL.	§	250TH JUDICIAL DISTRICT

PLAINTIFFS' AMENDED REQUEST FOR ENFORCEMENT OF JUDGMENT

Now come the Plaintiffs Edgewood I.S.D., et al. who request that this Court enforce its June 1, 1987 Judgment as modified by the Texas Supreme Court. In support of this request, Plaintiffs would show as follows:

1. Defendants have not enacted a constitutionally sufficient plan for the Texas School Financing System.

2. Defendants have passed a law, Senate Bill 1 of the 71st Legislature 6th Special Legislative Session, which Defendants will begin to implement on September 1, 1990, in violation of this Court's Declaratory Judgment and Injunctive Decree.

3. Senate Bill 1 violates Art. VII, § 1 of the Texas Constitution as well as Art. I, § 3 and Art. 1, §§ 19 and 29 of the Texas Constitution.

4. Senate Bill 1 violates the holdings of the Texas Supreme Court opinion in Edgewood v. Kirby.

5. Senate Bill 1 continues a system with vast disparities between poor districts and rich districts.

6. Senate Bill 1 does not change the system of School Finance in Texas; it is merely a band-aid.

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7. Senate Bill 1 does not create a system under which districts have substantially equal access to similar revenues per pupil at similar levels of tax effort; nor does it afford a substantially equal opportunity to have access to educational funds.

8. Senate Bill 1 would not efficiently educate the people nor provide for a general diffusion of knowledge state-wide.

9. Senate Bill 1 does not fulfill the Legislature's duty to provide an efficient system of public free schools throughout the state.

10. Senate Bill 1 does not guarantee Plaintiffs equal rights under the law.

11. Senate Bill 1 continues vast disparities in educational opportunity between persons in poor districts and persons in rich districts. This vast disparity is continued without a compelling or substantial state interest and with no rational basis.

12. Senate Bill 1 denies Plaintiffs liberty, property, privileges or immunities without due course of law.

13. Senate Bill 1 will cause Plaintiffs irreparable harm in 1990-91 by denying them their constitutional rights of equal opportunity and equal access to educational funds.

14. Plaintiffs are likely to prevail on this motion and the interests of Plaintiffs outweigh the interest of Defendants in continuing an unconstitutional system.

15. Plaintiffs have been prejudiced by the failure of the state to meet the time guidelines set by the Supreme Court of May

1, 1990 for implementation of a new school finance plan and have also been prejudiced by allowance of delays of implementation of this Court's judgment.

16. The Constitutional violations in Senate Bill 1 include but are not limited to:

A. The bill allows the continued inefficient use of the states resources in the wealthiest districts such as tax haven and budget balance districts.

B. The bill allows the wealthiest districts to raise and spend whatever they feel is appropriate for their education while limiting poor districts to an arbitrary figure for a adequate education.

C. The bill uses a vague and unenforceable standard for long term equity of the system.

D. The bill changes the counting of students to a method which will cause a loss of funding to minority and low income districts especially districts with large numbers of migrant students.

E. The bill decreases the recognition of the high costs associated with educating students with special needs.

F. The bill allows the funding of education to be based on a "funds are left over" basis rather than guaranteeing an efficient system.

G. The bill puts extensive new requirements on school districts without providing sufficient funding for districts to be able to pay for these new requirements; this causes an inequitable

burden to fall on low wealth districts and further decreases the efficiency of the system.

H. By reducing regulations on "exemplary programs," the bill will allow wealthier districts that have historically been able to provide more appropriate education for their children, to have additional resources with which to recruit and retain better teachers and maintain better programs.

I. Senate Bill 1 makes no attempt, or makes no meaningful attempt, to ensure equal access to facilities and equipment.

J. The Supreme Court mandate in this cause, as reflected by the opinion of that Court, requires that the Legislature in setting appropriations "must establish priorities according to constitutional mandates; equalizing educational opportunity cannot be relegated to an 'if funds are left over' bases." Senate Bill 1 ignores this explicit directive. Senate Bill 1 does not make the funding of the educational program mandatory or even a budgetary priority, Senate Bill 1 creates proration formulas in the event of budgetary shortfall and leaves the funding of education on the same footing as all other State programs, ignoring that funding of education is a constitutionally required priority. Furthermore, Senate Bill 1 does not even adequately fund the entitlement or the expectations which it creates by its own terms.

17. Plaintiffs have no adequate remedy at law and therefore injunctive relief is appropriate in this case; both temporary and

permanent injunctive relief are appropriate.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray:

1. That this Court set a hearing on June 25, 1990 to hear Plaintiffs' Motion for Temporary Injunction.

2. That the Court grant a temporary injunction enjoining Senate Bill 1 for the 1990-91 year and a permanent injunction against Senate Bill 1 for the length of its term.

3. That the Court implement a constitutional plan for the 1990-91 school year or alternatively for later school years.

4. That the Court issue a declaratory judgment that Senate Bill 1 violates the Texas Constitution specifically Art. VII, § 1, Art. I, § 3 and Art. I, §§ 19 and 29.

5. That the Court order Defendants to show cause why further relief should not be granted forthwith as provided in 37.011 Tex.Civ.Prac.&Rem.Code.

6. That the Court grant reasonable attorneys fees and costs.

7. That the Court grant other additional relief as appropriate.

DATED: June 27, 1990

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy by certified mail, return receipt request of the foregoing Plaintiffs' Amended Request for Enfocement of Judgment on this 27th day of June, 1990 to the following counsel of record:

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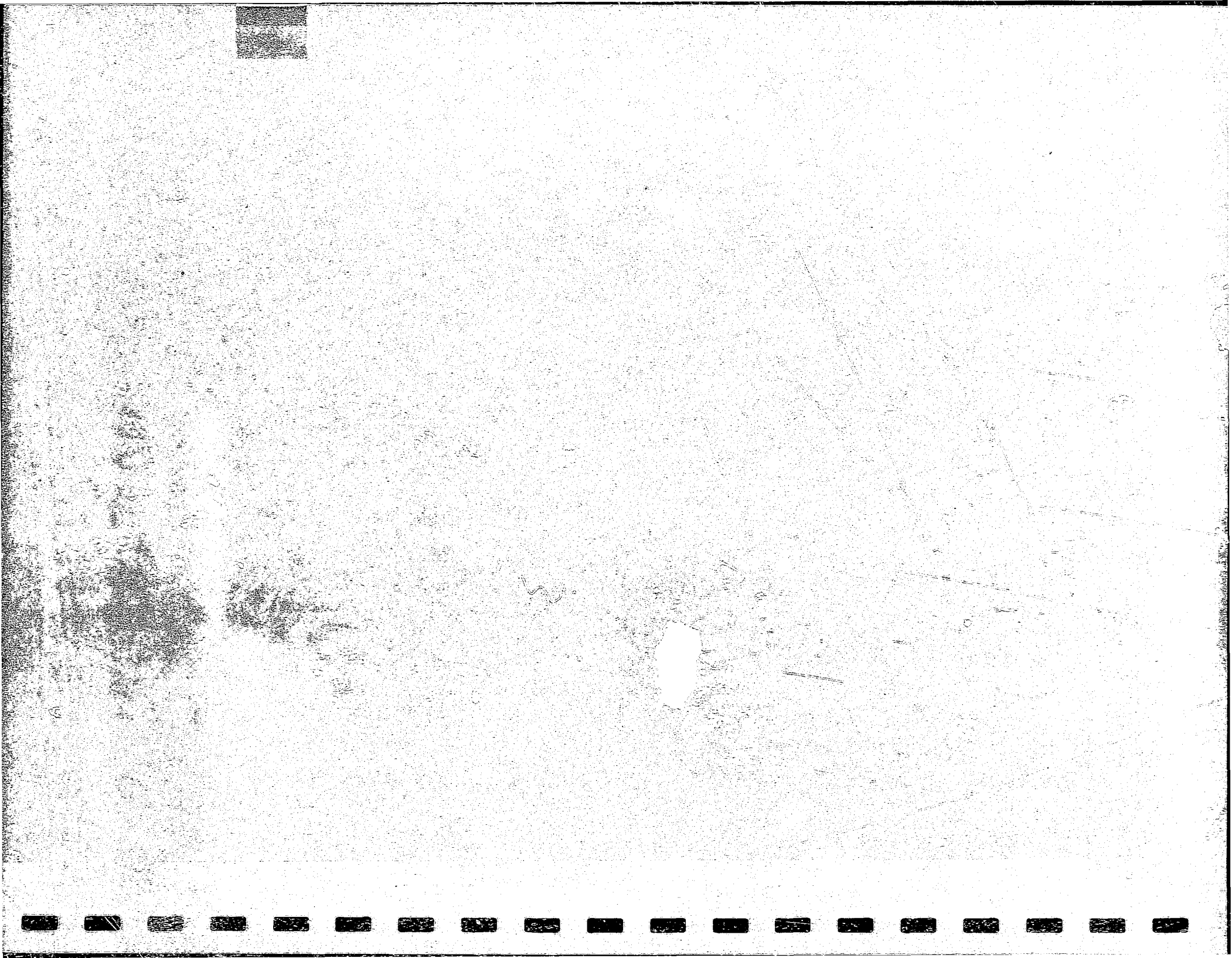

NO. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.	§	IN THE DISTRICT COURT
VS.	§	TRAVIS COUNTY, TEXAS
WILLIAM N. KIRBY, TEXAS COMMISSIONER OF EDUCATION, ET AL.	§	250TH JUDICIAL DISTRICT

PLAINTIFFS' POST TRIAL BRIEF

Now come the Plaintiffs Edgewood ISD, et al. who file this brief in support of their Motions for Enforcement of Judgment, Request for Temporary Injunction and Request for Modification of this Court's Previous Judgment.

In general this memorandum will address the following issues:

1. Whether Senate Bill 1 is constitutional.

2. If Senate Bill 1 is not constitutional what actions should this Court take.

3. Support for Plaintiffs' request for a temporary injunction to affect the 1990-91 school year, and permanent injunction to affect future years.

4. Support for Plaintiffs' request that this Court modify the June 1, 1987 Judgment of this Court explicitly to state that "local funds" as well as "state funds" are affected under this Court's Injunction.

I.

INTRODUCTION AND SUMMARY OF ARGUMENTS

Senate Bill 1 violates the Texas Constitution, art. VII, Sec. 1 and art. I, Secs. 3, 3a, 19 and 29.

Edgewood v. Kirby, 777 S.W. 2d 391 (Tex. 1989) sets forth the standards which any constitutional school finance system must meet.

Senate Bill 1, even if it met its "95% goals" does not meet the standards of the Texas Constitution as interpreted in Edgewood v. Kirby.

Even if the "95% standard" is constitutional, Senate Bill 1 does not provide a plan to meet that goal. Senate Bill 1 is nothing more than a statement of a general goal without a plan to be implemented to meet this goal. Although this Court did state that a completely constitutional plan need not be completely implemented the very first year of the plan, it did state that the plan must be written and begun to be implemented. As shown by every witness that appeared before the Court, Senate Bill 1 is nothing more than a promise to endeavor to begin to approach certain goals, as long as the approach is acceptable to the leadership of the Legislature which must consider those goals in light of their overall duties to balance the budget and pass legislation.

The failure of the Legislature to implement a constitutional plan puts upon this Court the duty more explicitly to state the Legislature's obligations and to place into effect a constitutional plan, while giving the Legislature another opportunity to put forward a plan that meets the standards of this Court's plan.

The Legislature must make changes during the 1990-91 year because of the irreparable harm being caused to Plaintiffs during 1990-91. In order to reduce any prejudice to the Defendants, the

new plan will be phased in, and districts will not receive less state funds than they would under Senate Bill 1.

In order to assure that the Legislature meets its long term obligations, and that the Court and Legislature are not forced into a last minute confrontation with all of its concomitant issues of judicial-legislative relations, this Court should implement a plan for the 1991-92 and later school years, while giving the Legislature the opportunity to devise a plan of equally high standards. However the legislative plan must be written, passed and submitted to the Court by January 1, 1991 in order to allow sufficient time to review the Legislature's plan and determine its compliance with this Court's orders.

In order to place the burden of non-compliance, if non-compliance is continuing, upon both wealthy and poor districts, this Court should clarify its previous judgment more explicitly to state that this Court's Judgment enjoins the use of state as well as "local" funds, should the Legislature fail to implement a constitutional plan, or fail to carry out this Court's order to implement the Court's plan.

II.

BURDEN OF PROOF

In previous memoranda Plaintiffs have argued that the burden in this case is upon the Defendants to show that they have passed and implemented a constitutional plan. (Memorandum of)

The Defendants are seeking a change in this Court's previous judgment, as affirmed by the Supreme Court. This changes the

normal presumption of constitutionality attached to an act of the Legislature. In addition, because this is an equal protection case involving fundamental rights and suspect categories, the Legislature must show a compelling state interest in its school finance plan. The defendants have not abided by this Court's judgment and therefore under the declaratory judgment act must show cause why their failure to abide by this Court's earlier orders should not submit them to contempt proceedings.

III.

SENATE BILL 1 DOES NOT MEET THE STANDARDS OF EDGEWOOD V. KIRBY

The factual basis for the Supreme Court decision in Edgewood v. Kirby, 777 S.W. 2d 391 (Tex. 1989) highlighted the inequities caused by districts above the 95th percentile of wealth. In fact all of the major fact findings in the Supreme Court's decision, pgs. 392-93, included the districts in the wealthiest 9%, both the "budget balance districts" and other very wealthy districts.

The witnesses in this case have testified that there will be no major changes in any of the facts relied upon in the Supreme Court decision in Edgewood, under Senate Bill 1.

In summary the Supreme Court held that "Article VII, Sec. 1 never contemplated the possibility that such gross inequalities could exist within an "efficient system." Edgewood, at 395.

"The constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live." "The present system, by contrast, provides

not for a diffusion that is general, but for one that is limited and unbalanced." Id.

The Supreme Court noted that more money would help to reduce some of the existing disparities, but "would at best only postpone the reform that is necessary to make the system efficient." The overwhelming evidence is that the Legislature failed to heed this admonition but instead fell into the trap of, as this Court stated, "writing history into law."

Senate Bill 1, even if it is considered to meet its 95% standard is a band-aid and not a change of system. This violates the clear standard in the Supreme Court decision; "a band aid will not suffice; the system itself must be changed." Edgewood, at 397.

The Supreme Court held that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." Edgewood, at 397. However the Supreme Court did not approve of the concept of excluding any percentage of students from the overall system, nor of tying the state into a system of continued inferior conditions in the poor districts with continuing cycles of lesser inferiority and greater inferiority. The Supreme Court did speak of the rights of "children who live in poor districts" and compared those to "children who live in rich districts." The Court recognized differences in area costs and costs associated with providing an equalized educational opportunity to atypical students and disadvantaged students. Edgewood, at 398.

The Supreme Court also summarized a standard in this Court's judgment regarding local enrichment from local tax effort. Specifically the Supreme Court said: "nor does it mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local enrichment must arise solely from local tax effort." This is merely a restatement of this Court's June 1, 1987 judgment which stated: "nothing in this judgment is intended to limit the ability of school districts to raise and spend funds for education greater than that raised or spent by some other school districts so long as each district has available, either through property wealth within its boundaries or state appropriations, the same ability to raise and spend equal amounts per student after taking into consideration the legitimate cost differences in educating children." June 1 1987 judgment at page 6.

Defendants have sought to take one phrase of the Supreme Court judgment and design a school finance system based upon it, i.e. a system limiting the percent of students in the state that are in an "equalized" system and then allowing unequalized enrichment above that. But this one phrase regarding local enrichment must be considered in light of the entire Supreme Court opinion. That opinion criticizes the structure of the school finance system, requires a consideration of fiscal and student equality and sets standards for all students in the state. Indeed the Supreme Court wrote a significantly greater part of its decision speaking about the Legislature's responsibility not to relegate education to an

"if funds are left over" basis, than it did to the section on local enrichment.

As stated by the Supreme Court, "an efficient system. . . requires only that the funds available for education be distributed equitably and evenly."

The Defendants have also sought to turn Edgewood v. Kirby into a "fiscal equality" decision. The Supreme demanded an efficient system and did not limit the method of achieving that efficient system. The opinion is replete with examples of the use of equal protection terminology and structure as well as "efficiency." The opinion specifically noted the link between efficiency and equality.

It is simply impossible to believe that the Supreme Court would see as perfectly equitable and efficient a system which at its best would allow hundreds of thousands of children to have $3500 a year spent on them, hundreds of thousands of children to have $5000 a year spent on them, and hundreds of thousands of children to have 6, 7 and 8,000 dollars spent on them all of which would merit a "perfect score" on the fiscal equality measures proposed by the State. (Moak testimony)

Senate Bill 1 does exactly what the Edgewood v. Kirby told the Legislature not to do. It put in some additional funds without changing the structure of school finance in Texas.

Senate Bill 1 will reach some level of equity only if all of the assumptions that the state wishes the Court to accept, become true. Specifically there will be equity for the 95% only if high

wealth districts do not raise their taxes, if low wealth districts do raise their taxes and maximize their amount of state aid, if the Legislature in fact funds the bill at the full level and not at the minimum level, if the ADA changes do not result in great reductions in a large number of poor minority districts, if the Legislature meets its responsibilities to continue the weighted student concept in the second tier and if the Foundation School Fund Budget Committee and the Legislative Education Board do not decide to greatly reduce the basic numbers in the school finance system. The testimony simply does not support all of these assumptions. While this Court cannot assume that the Legislature will act in bad faith, it must require the Legislature to put forward a real plan and not just a set of assumptions that, if true, might lead to increased equity for only 95% of children in the State.

IV.

SENATE BILL 1 DOES NOT EVEN GUARANTEE EFFICIENCY AND EQUALITY FOR THE 95% OF STUDENTS IN THE STATE

If one were to advise the Legislature about how to put forward a plan which might receive Court approval while not binding the Legislature to any long term changes in the school finance system, or major additions to state aid, Senate Bill 1 would be an excellent suggestion.

The entire structure of the Bill is based on the assumption that it is necessary to allow the Legislature to change the various values at a latter time based on a series of studies which they can control and still purport to meet an objective sounding standard.

The 95% standard has been discussed in many different ways: (1) the purest 95% standard is one that would guarantee full access for 95% of students to as much revenue as the district at the 95th percentile can raise at any tax rate, based on the full revenue of the school district including full state and local revenue, and state contributions through teacher retirement and the textbook fund. Senate Bill 1 does not even proport to do this; (2) a lesser standard would be to guarantee access for 95% of the students to the revenue of the 95th percentile district, at the 95% of tax rate. This would be based again on full revenues of the districts; (3) a much weaker "95%" would be one which requires no statistically significant relationship between wealth and yield per pupil or 95% of the students, <u>based on the full revenues of the districts.</u> Again Senate Bill 1 does not even accomplish this because the statistical significance test will be based not on full revenues of districts but on some lower revenues of districts. PX 34 shows the types of revenue distributions that would meet the test of Senate Bill 1; (4) the weakest "95%" bill is Senate Bill 1 which does not even purport to guarantee equality for 95% of students at any particular revenue level, but only a lack of statistical significance between wealth and yield for 95% of students, when the revenue is not the full revenue but some "synthetic" revenue created by a long term manipulable committee process.

Therefore this Court cannot assume that Senate Bill 1 meets any realistic expectation of "95% full equality." It was expressly

designed not to do that and the arguments of Defendants' counsel should not be able to turn a "sow's ear into a silk purse."

V.

THE FAILURE OF THE LEGISLATURE TO PASS A CONSTITUTIONAL PLAN FORCES UPON THIS COURT THE UNWELCOME TASK OF IMPLEMENTING A CONSTITUTIONAL PLAN

Even after an unanimous Supreme Court Opinion, the Legislature did not pass a constitutional system of school finance. This failure will thrust the Court into the "unwelcome task" of implementing a constitutional plan.

The special circumstances of the schedule of the Texas Legislature require that the Court not await the outcome of the next regular session of the Texas Legislature. Even if this Court declares Senate Bill 1 unconstitutional and that is affirmed by the Supreme Court, the Legislature will not have a new law until June 1, 1991. This will thrust the parties and the Court into a crisis management situation the same as in the May 1st and June 1st 1990 hearings.

Similarly, if this Court orders the Legislature to come up with a plan at an earlier date, for example March 1, 1991 but does not have an alternative plan delineated, further hearings on the "new plan" would again put the parties and the Court into a crisis management situation. Whatever the Legislature produces would have to go into effect because of the lack of time to have hearings, make a ruling and then implement a new constitutional system. Also failure of this Court to implement a school finance system will

reduce the chances to obtain clarification from the Supreme Court on the elements of a constitutional school finance plan.

Of course the most important factor is that the children who filed this case in 1984 have still not had an opportunity to live under a constitutional school finance system and each additional year of delay denies another year of students the opportunity to participate equally in the Texas educational system.

Other state courts have grappled with the question of the intensity of the judicial role in specifying a remedy to an unconstitutional school finance system. While these courts have shared a sense of deference to the legislative process they have also balanced that sense of deference with their underlying responsibility to fashion a remedy to a recognized deprivation of rights under their state constitutions. The balance which seems to have been struck most often is one between allowing the legislature additional time on the one hand before imposing a comprehensive court mandate while on the other hand setting fairly specific interim measures or standards to govern the state finance system while the legislative process was allowed to work. Two instances are instructive of this balancing process.

In Robinson v. Canill, the New Jersey school finance case, the trial court noted that: "... the judiciary would not invalidate a statute simply because all the funds necessary to fulfill its objectives were not made available in the first year or two of operation." 287 A.2d 187, 211 (1972). The court imposed an operative date of one year in order for the legislature to bring